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GREENLEAF'S CRUISE.*

Mr. Greenleaf has dedicated his admirable edition of *Cruise's Digest of the Law of Real Property* to his pupils, in the following terms: "To my beloved Pupils, these labors, originally undertaken for their benefit, are inscribed, by their affectionate friend, Simon Greenleaf." Nothing from him needed any special inscription to his pupils to interest them, wherever scattered throughout the land. None have forgotten his faithful teachings, during his protracted career as Professor of Law in Harvard University. All will value an opportunity of enjoying them yet once more in his juridical publications. Especially will they value the opportunity of meeting him again in the difficult department of Real Law, where his peculiar talents, and his persevering studies render him an undoubted master.

It is by the phrase *these labors*, in the dedication, that he refers to what he has done in the present work. On the title-

* A Digest of the Law of Real Property. By William Cruise, Esq., Barrister at Law. Revised and Considerably Enlarged by Henry Hopley White, Esq., Barrister at Law, of the Middle Temple. Further Revised and Abridged, with Additions and Notes for the Use of American Students, by Simon Greenleaf, LL. D., Emeritus Professor of Law in Harvard University. In Seven Volumes. Boston: Charles C. Little & James Brown. London: Stevens & Norton, 194 Fleet Street. M DCCC XLIX.

page, the edition is said to be "revised and abridged, with additions and notes for the use of American students." In the preface, he discloses still further the nature of his labors. In correcting the text, he has endeavored to abridge those cases which were transcribed at large from books easily accessible to every American lawyer, retaining the full reports of those cases only which cannot be conveniently found elsewhere. The titles, chapters, and cases, which were believed to be of no use to the profession in this country, have been wholly omitted. Most of the English statutes, enacted prior to the revolution have been retained, as they stood in Mr. Cruise's text — including all those which were passed before the settlement of the American colonies, and are supposed to have been brought over and adopted by the colonists as part of the English law. The later statutes, contained in the body of the work, have been transferred generally, in an abbreviated form, to the notes. No notice has been taken of the changes made by recent statutes in England.

It seems to have been the original purpose of Mr. Greenleaf to embody in the text (distinguished by parentheses) all the cases in which the common law has been modified and expounded in England and the United States; but this design, after proceeding in it to some extent in the first volume, was abandoned, and all new matter confined to the notes. In the notes also he has set forth the local legislation of the several States of our Union, bearing on the different topics discussed.

It will appear from this statement, that the present work purports to be a complete and practical exposition of the Law of Real Property, as recognized and established in the United States. And we have no hesitation in declaring, after a careful examination of the two volumes, which are now before the public, that the work, when finished, will in all respects answer these promises. It will be a systematic repertory of the whole complex Real Law of our country. We have been sometimes disposed to regret that Mr. Greenleaf did not dispense entirely with the fabric of Mr. Cruise, and reconstruct the whole subject, from the orignal materials, in his own happy manner. He was, probably, influenced by a conviction of the high merits of Mr. Cruise's work, and of its intrinsic fitness, with additions and adaptations, for an American text-book. Nor are we willing to say that he has been mistaken in this.

Of all the English works on the Law of Real Property, that of Mr. Cruise is at once the most complete, practical, and available for purposes of study. It is a *Digest* of all the law in this department. Here will be found the learning of Coke on Littleton, the unsurpassed juridical exercitations of Hargrave, and the technical analytic skill of Fearne. From all these writers, he has drawn contributions. To these must be added a careful and well-arranged exposition of the results of all the decided cases bearing on the subject. Before the publication of Mr. Cruise's work, no person was supposed to be well read in this department, who had not painfully explored these different sources. The young student, on the very threshold of his professional lucubrations, was awed by the appearance of Coke on Littleton, and many of the present elders of the profession may recount the sinking of the heart as they looked upon the stern black-letter in which it was printed. The late Mr. Justice Story was accustomed to say, that the copy which he first used was stained with his tears. The studies which followed, though less appalling, were without the facilities, not to say attractions, which are now afforded.

No faithful student of our day will be willing to forego repeated consultation of these earlier sources. But Mr. Cruise's work has, in a great degree, rendered it unnecessary for him to read them critically. Here the student will find, in a systematic form, what may be called *all the learning* of the subject. Let him master this, and he cannot fail to be skilled in the most difficult department of the law. It is not too much to say, that there is no other single book, which can initiate him so fully in this department as that of Mr. Cruise.

Regarding this work, probably, in this light, Mr. Greenleaf has devoted himself to the labor of perfecting it for the American student. In short he has *Americanized* it, by pruning those parts which were of no practical value in our country, while he has added all the matters, whether of legislation, or of judicial decision, which were essential to the complete treatment of the subject for the purposes of the American student and practitioner. In thus furnishing an American edition of an English work, he does not seem to have shrunk from labor. His annotations, and the various results of his studies, attest the constant incorporation of his own mind in its pages. We

perceive everywhere the skilful learning, the accurate statement, the nice language, and the well-supported text, which have been so much admired in the Treatise on the Law of Evidence. So important are *these labors*, that the American lawyer, while confessing his obligations of gratitude to the original author, cannot fail to associate with him the present editor, and the names of *Cruise* and *Greenleaf* must be joined together in his homage.

Among the additions of practical value, we cannot forbear to notice the lists of *books of reference*, which precede each title, indicating to the inquirer the sources to which he may repair for further light on the subject. Thus, for instance, preliminary to the title on Tenures, we find a list of twenty-eight different works, in which this topic of curious and instructive learning is treated. As an illustration of the manner in which the work has been adapted to the American student, we would refer to this very title of Tenures. We find, for instance, on page 17, an elaborate note suggested by the ancient doctrine of the feudal law, as to the obligation of the lord, to give his vassal, on eviction, another feud of equal extent, or else to pay him the value of that which he had lost — showing the wide diversity of opinion, existing at this day, in the United States, in regard to the proper rule of damages in actions on covenants of warranty. The nature of feuds, and of the title to lands, suggests, on page 23, an interesting annotation on the European title to soil in America, touching upon the feudal origin of our republican doctrines of escheat, and of forfeiture for waste. The *third* chapter of this title, embracing *modern English Tenures*, is omitted, as being of very little use to a lawyer of our country. That the reader may understand the nature of these omissions, we give the heads of this chapter; Manors, Courts Baron, Inferior Manors, How Manors are destroyed, Tenure in Socage, By Petit Sergeanty, In Burgage, In Ancient Demesne, In Gavelkind, Incidents to these Tenures, Charges in Socage by Stat. 12, Cha. II., Tenure in Villanage, Copyholds, Free Copyholds, Tenure in Frankalmoigne.

The next title of Mr. Cruise's work, Estate in Fee Simple, furnishes Mr. Greenleaf an opportunity for copious additions and annotations. Here his own labors compare in extent, as in value, with those of the original author. And, as we advance

in the work, we find that, in proportion to the practical importance of the subject in our country, and to the materials afforded by our legislation and decided cases, the expositions of the editor expand, as in the portions on Dower, Trusts, Estates on Condition and Mortgages.

As we have pursued the Law of Real Property through the pages of the present work, enlightened by apt and learned labors, we have been impressed anew by the superfluous technicality of the whole system, attesting its barbarous feudal origin. It is not probable, however, that we shall soon witness any very important modification of its general principles. We would venture to suggest, however, to the student, as he daily ponders its traditional subtleties, to ask himself how far there exists in reason, and independent of extinct feudal customs, any substantial ground for treating real property different from personal property. It is possible, that some day, there may be an occasion to deal with this question practically. Meanwhile the present work must be a standard manual and authority of the American lawyer. It will be a necessary companion in his studies, and will be always present on the shelves of his library, when it is not on his table or in his hands. As a work of repute and universal professional use in our country, it will take its place by the side of the Treatise on the Law of Evidence.

CASE OF W. S. O'BRIEN.

THE case of William Smith O'Brien has at length been determined by the supreme court of appeal, and the result is, a decisive and unanimous judgment for the crown.

The objections raised by the plaintiff in error were four in number. They will be found stated at length in one of our former numbers, (12 Jur. p. 489,) and it will be sufficient now to refer to them briefly. The first objection was to the caption of the indictment, which recited a commission to three judges, by name, empowering them, "with others," to try the prisoners. Only the three judges named, in fact, did try them, and it was urged that they had not authority for this purpose, especially in the absence of a quorum clause: but the house of lords decided

that the three judges had such authority; that the direction to them by name was sufficiently certain, and was not rendered uncertain by the part which followed as to others being joined with them.

The second error assigned, and the most important in the opinion of the counsel for the prisoner, was, that he had not been furnished with a copy of the indictment and a list of the witnesses ten days before the trial, according to the stat. 57 Geo. 3, c. 6. This objection, which was raised with so much practical success in *Frost's case*, (2 Mood. C. C. 140; 9 C. & P. 129,) was now held untenable, as the statute does not apply to treason committed in Ireland. A question naturally arises connected with this part of the case, whether, if such a privilege be required by persons accused of treason in England, it should not be extended, by statute, to those who are accused of a similar offence in Ireland? The view entertained by the house of lords with regard to this objection rendered it unnecessary for them to decide whether it should have been raised by plea or by motion to the court. In *Frost's case*, it was decided that it was too late to take the objection after plea pleaded, and that, if taken in due time, its only effect would be a postponement of the trial, in order to give time for a proper delivery of the list and copy.

The third error assigned was, that to levy war against the queen in Ireland, was not to do so within "this realm," according to the stat. 25 Edw. 3, (on which it was contended the sixth count was founded); but that statute was held to have been extended to Ireland by Poyning's Acts.

Fourthly, it was urged that the "allocutus" was defective, as the prisoner was asked what he had to say why "judgment" should not be passed upon him, whereas it was contended, that he should have been asked why "judgment of death" should not be passed upon him; but this was held to be sufficient, as by "judgment" was intended the sentence allotted by law to the offence. — *London Jurist.*

Recent American Decisions.

District Court of the United States, District of Maine, June Term, 1849, at Portland.

Skolfield, *v.* Potter et al.

When a vessel is let to the master to be employed by him, and he is to pay to the owners a certain portion of her earnings, the owners will be liable to the seamen for their wages, though by the agreement the master is to have the entire control of the vessel — to victual and man, and furnish supplies at his own expense, unless at the time of shipping, this contract is made known to them, and they are informed that they are to look to the master as the only owner.

The money that is paid over by the master, is paid as freight, and the owners as receivers, and having an interest in the freight, are liable to seamen for the wages.

The freight is hypothecated for the wages, and every part of the freight is liable for the whole wages. The owners, who have received freight under such a contract with the master, are liable for wages to the full amount of the freight in their hands, and not merely *pro ratâ* in proportion to what they have received.

The merchandise is bound to the ship for the freight, and the freight to the seamen for their wages.

When the owners of the ship are also the owners of the cargo, the cargo owes freight to the ship, and this freight is pledged for the wages.

The decision in the case of *Poland* v. *The Spartan*, reviewed and affirmed.

This was a libel *in personam* against the owners of the schooner Arrowsic, for seamen's wages. The libellant shipped at the port of Bath, as mate, on the 22d of September, 1848, on a general trading voyage, and continued on board, and did duty, as mate of the vessel, in several voyages, two of which were to foreign ports, until the return of the vessel to Bath on the second of May following. On his discharge, the master delivered to him a barrel of flour, part of the cargo belonging to the owners, and gave him an order on the owners for the balance of his wages due, amounting to $128, including the flour. The owners paid him $25 on the presentment of the order, and promised to pay him the residue in a few days. But after calling on them several times, and being put off from time to time, he filed a libel. The owners, in their answer, not denying that the services have been rendered, set forth a defensive allegation, denying their liabilities for the wages. The defence relied upon, is, that the vessel was let to the master on

a verbal agreement that he was to have the use and control of the vessel, to employ her as he should choose — he to victual and man her at his own charge, and to pay them for the use and charter of the vessel, one half of her gross earnings, deducting one half of port charges. It was contended, that having by this contract parted with the possession or control of the vessel, the master became owner for the voyage, or the term during which the master employed her under this contract, and as such was exclusively liable for supplies and seamens' wages, and that they, as the general owners were exempted from all liabilities for these charges.

J. M. Adams, for the Libellant.
P. Barnes, for the Respondents.

WARE, District Judge. It is admitted in this case, that the services have been performed, and that wages are due. Some question was made on the evidence as to the balance that remains unpaid. Two charges of ten dollars each, made by the master for money advanced before the termination of the service, are objected to by the libellant. To prove these, the master produced his memorandum book, in which these sums were charged; and this, with his suppletory oath, would be sufficient as *primâ facie* evidence, even if the suit were against the master himself. They stand charged in the same book, which contains all the other charges, which are not objected to, and which agree with the account kept by the libellant himself. They are the two last charges in the account, and at the time of his discharge, the parties came to a settlement, and a draft or order was given and accepted by the mate for the balance found due. In this settlement these sums were allowed, and it appears without objection at the time. I see no objection to their allowance now.

The important question in the case, is, however, whether the respondents are liable for the wages. The schooner was let by a parol contract, by which the master, as hirer, was to have the possession and control of the vessel — was to navigate, to victual and man her at his own charge, and employ her in such business as he should choose, and to render to the owners for the use of the vessel, one half of her earnings. It was ob-

jected at the argument that it was not competent to a party to prove such a lease of a vessel by parol evidence, at least to affect the rights of third persons. It is true that by the general maritime law, it is held that the title to vessels must be shown by writing, *The Sisters*, (5 Robinson R. 155,) and the contract of letting and hiring also should regularly be, and usually is, proved by a charter party in writing. But it has been held by a variety of decisions in this country, that such a parol lease is valid not only between the parties, but to conclude the rights of third persons who are strangers to it.

It seems also to be settled by the general current of the decisions, that under a letting of the vessel itself, whether by a written charter or parol contract, when the possession of the vessel is transferred to the hirer, and he appoints the master and crew, and sails her at his own expense, and has the entire control, that he is to be considered, with respect to third persons contracting with the master, as the owner, and that he succeeds to all the rights and liabilities of the owners. The general owners or proprietors have then no lien on the merchandise for freight, nor are they personally liable for supplies furnished to the vessel on the contract of the master, but the hirer is substituted in their place, both as to their rights and liabilities. (3 Kent's Com. 136; Conkling's Jurisdiction, Law and Practice of the Admiralty, 135.) Nor does it make any difference, according to the decisions, though the charterer goes himself as master. *Reeve* v. *Davis*, (1 Adol. & Ellis. 135, 23 E. C. L. R. 95.) The cases in this country go further, and decide that when a vessel is taken by the master on the terms that this was, and he is to have the control, and direct the employment of her, and the earnings to be divided between him and the owners; that this is to be considered as a lease or charter of the vessel. The master is held, under such an agreement, to be the special owner, and the general owners not liable on his contracts for supplies furnished the vessel while thus employed. *Taggard* v. *Loring*, (16 Mass. R. 336); *Emery* v. *Hersey*, (4 Greenl. 407); *Thompson* v. *Hamilton*, (12 Pick, 425); *Cutler* v. *Thurlo*, (20 Maine, 213); *Thompson* v. *Snow*, (4 Greenleaf, 264); *Cutler* v. *Winsor*, (5 Pick. 335.)

But it is evident, when the owners put their vessel into the possession of the master on such terms, that the contract is of

a mixed, and somewhat ambiguous, character. In one aspect, it may be considered as a charter of the vessel, and this as a mode adapted to determine the amount of the charter or hire to be paid. Viewed in another light, it partakes of the nature of a partnership, in which one partner furnishes the capital and the other contributes his time and labor in the transaction of the business, and the profits to be divided. In a third view, it may be considered as a contract of hiring of the master, he to receive a share of the earnings of the vessel, instead of a certain and stipulated sum for his wages. In the various cases in which the subject has been brought before the courts for adjudication, it has been presented in these various lights; and without any great violation of legal analogies or legal principles, the contract may be considered as belonging to one class or the other. In a case before Lord Ellenborough, *Dry* v. *Boswell*, (1 Camp. 329,) the evidence first offered, being that the owners and master were to share equally in the profits, he declared that it was a partnership adventure, and that the master and owners were liable as copartners, a joint participation of profit and loss constituting a partnership; and when on further evidence, it appeared that the master was to have a share of the gross earnings, and not to be liable for losses, he pronounced it to be a contract of hiring of the master by the owners, and that this was only a mode of determining the amount of his wages. Generally, however, the courts have considered the contract as a charter of the vessel, and the master as owner for the voyage; and as a corollary from this decision, it is held that the general owners are not liable for the master's contracts for supplies and repairs in the course of the voyage.

But though this is the general language of the authorities, there are exceptions. The case of *Rich* v. *Coe*, (Cowper, 636,) is a strong decision the other way. Lord Mansfield, in delivering the unanimous decision of the court in that case, observed, that whoever furnished supplies to a vessel on a contract made by the master, has a threefold security: 1. The person of the master. 2. The specific ship. 3. The personal liability of the owners; — and he added, that it makes no difference in the liability of the owners, that there is a private agreement between them and the master, by which he is to furnish the supplies and keep the ship in repair, unless the creditor has notice

of the contract, and gives credit to the master individually.[1] The doctrine of Lord Mansfield seems to have been entirely satisfactory to Mr. Justice Story, for in his treatise on Agency, § 298, he states the law nearly in the words of this great master of maritime law, though the more recent decisions, which seem materially to qualify, if they do not directly overrule the doctrine, must have been quite familiar to his mind. Indeed, with respect to some of them, he has on other occasions not hesitated to express his doubts in very pointed terms. *Arthur* v. *The Cassius*, (3 Story, R. 93); *The Nathaniel Hooper*, (3 Sumn. R. 577.) And Chancellor Kent, though he seems to have yielded to the authority of the later decisions, expresses his own opinion in terms very nearly, if not entirely, agreeing with the doctrine of Lord Mansfield. "To whom was the credit given, seems to be the true ground on which the question ought to stand." (3 Comm. 135.)

Now, if this contract between the hirer and the owners is not known, the supplies are always furnished on the personal credit of the owners, as well as on that of the master. In the opinion, therefore, of Chancellor Kent, as well as of Judge Story and Lord Mansfield, although the owners have let their ship by charter party, under which the master, if he is the hirer, is bound to bear all the expenses of supplies, they ought to be held bound to third persons on the master's contracts, which fall within the scope of his ordinary authority as master, unless this private agreement is made known; for if it is not, supplies are always furnished on the credit of the owners. The owners, by putting the master in possession of the vessel, hold him out to all who are ignorant of the special contract, or at least enable him to hold himself out as authorized to bind them personally, by all contracts relating to the usual employment of the vessel. And if any one must suffer for his acts, it is more reasonable that the loss should fall on them than on strangers, who have given him credit on the ground of his official character.

It is admitted, however, that the current of judicial decisions is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a con-

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[1] In the case of *Reeve* v. *Davis*, (1 Adol. & Ellis,) which seems directly to overrule this decision, the case itself was not referred to, either by the counsel or the court.

tract. But no decision has yet gone so far as to relieve them from their liability for seamen's wages. (Curtis's Rights and Duties of Seamen, p. 336.) The seamen have always this triple security, besides a direct hypothecary interest in the freight; and in all ages of the maritime law, their claim for wages has been highly favored, both on the ground of general commercial policy, and from the consideration of their own habits of carelessness and characteristic improvidence. They habitually enter into their engagements in reliance on these securities, and they ought not, on principles of public policy and natural justice, to be deprived of them by any refined and subtle distinctions of law, which are so alien from all their habits of thought and action.

This form of contract, of letting vessels to the master, to be employed on shares, has become very common in this part of the country, especially with respect to small vessels employed in the coasting trade. The master to whom the vessel is entrusted by the owners, is usually an enterprising and industrious young man, but ordinarily of limited pecuniary responsibility; for as soon as he acquires sufficient capital or credit, he becomes a part owner himself. These contracts are almost invariably by parol, and the terms are settled by a well understood usage. The master, under the usage, is to bear the whole expense of victualling and manning her. The port charges in the various ports visited, are first to be paid from the gross earnings of the vessel, and the balance of the freight is to be divided into equal shares between the master and owners. The seamen often, and perhaps usually, have no knowledge of this private contract between the master and owners, and they engage their services in reliance upon the ordinary security, which the general marine law gives them. It is admitted that the weight of the authorities is in favor of exempting the owners from their liability for ordinary supplies, while the vessel is employed under such a contract.

If this mode of letting the ship to the master, to be employed on shares, relieves the owners from their liability for wages, the contract will operate on the seamen, probably, in the great majority of instances, as a perfect surprise. After the termination of his service, he finds one part, and an important part, of his security, the personal liability of the owner, is gone, under a

private contract unknown to him; and that of the master may be, and often will be, worthless. There remain, it is true, the freight and the vessel, but the freight is received from time to time, and there may be, and usually is, little remaining due at the end of his service. The ship is indeed an ample security. But since the act of March 3d, 1847, ch. 55, respecting costs in Admiralty proceedings *in rem*, by which all costs are denied to the libellant, except for the payment of witnesses, unless he recovers more than one hundred dollars, the remedy against the vessel for all useful purposes, is taken away, when the suit is for less than the sum named. And in these coasting and trading voyages, the balance of wages will rarely amount to so much as one hundred dollars. The consequence will be, that practically, the seamen will have for their security nothing beyond the personal liability of the master.

No judicial decision has yet extended this modern doctrine so as to deprive the seamen of their ancient right of recourse against the owners. The whole doctrine in the cases, to which it has been applied, is not free from difficulties on the principles of our law, except with the limitation mentioned by Lord Mansfield, that the creditor is notified of the non-liability of the owners at the time the credit is given. Because, when he contracts with the master, he has always a right to believe that he is contracting with the owners, if he is not advised to the contrary. If he is informed, and then gives credit, he knows to what security he trusts. To extend the principle so as to bar the right of the seamen, would be repugnant to the general spirit of the maritime law, which has studiously provided in their favor the greatest security for their wages. I am unwilling to be the first judge to give it that extension. Indeed, the original doctrine of Lord Mansfield, appears to me to be the most just, and most in harmony with the general principles of our law. The master, by the known rules of law, represents the owners as their agent, and is authorized to bind them by all contracts relating to the usual employment of the ship. The seamen enter into their engagements with the full confidence that the owners are bound for their wages. If it must be admitted that the decision of Lord Mansfield is overruled by the later decisions, these go no farther than to exempt the owners from their liability for supplies furnished by men, who

are in the habit of looking well to their securities. Rather than extend these decisions by analogy, to the claims of the crew, unless I can clearly see that on principle, the owners are exonerated, I am ready to say, *Malo cum Platone errare* — I will not add, *quam cum ceteris vera sentire* — but sooner than follow the analogies of decisions, the soundness of which is so questionable, and carry them out, to the exclusion of the seamen from their recourse against the owners, unless at the time of their engagement they are plainly told that they are to look to the master as the only owner. The concealment of a fact of such importance, is a fraud on the men.

But I do not put the decision of the case on this ground alone. There is another on which I think the owners are bound for the wages.

By the ancient maritime law, the title of seamen to wages, is made to depend on the issue of the adventure, for which they are engaged. Unlike other contracts of hiring, their right to compensation does not depend alone on the fidelity and skill with which they perform the services for which they engage; but with whatever perseverance and courage they exert themselves, their right to compensation is suspended on contingencies, which may affect the ultimate result of the voyage; it is made dependent on what has been termed the fortune of the vessel. What then is this fortune to which the seamen must look? The ship, says Emerigon, in the condition in which she was at the time of her departure from the port of outfit, together with all the freight which is gained in the course of the voyage, form that fortune of the vessel which constitutes the pledge to the seamen for their wages. (*Traité des Assurances*, c. 17, § 11.) The privileged hypothecation, then, he adds, allowed to the mariners, comprehends every part of the ship and every part of the freight, according to the nature of hypothecation, which is *tota in toto et — tota in qualibet parte*. Their privileged line is entire over the whole, and is entire in every part. The ship and the freight, with respect to wages, form one mass, and all that remains of either, at the end of the voyage, is pledged for their payment. The contract of the mariners, Emerigon goes on to say, is a species of copartnership. It is not indeed a partnership as to all the effects of that contract, but as to some of its consequences; for

the seamen have no claim to a remuneration, but to the extent of the effects embarked in the enterprise, which they bring home. If all is lost, the mariners lose their wages, and they cannot then enforce the payment by a personal action against the master or owners. But if all is not lost, whatever remains of the ship or freight, is specifically pledged for their payment. Freight earned and put ashore, is saved from the effect of a supervening shipwreck, by which all that remains is lost. It is a partnership fund, that has entered the common chest, and is hypothecated to the seamen for their wages.

It is now more than twenty years since I was first called upon to examine this right of the seamen to claim their wages out of the earnings of the vessel. It was in the very ably contested case of *Poland* v. *The Spartan* (Ware, R. 145–6.) In that case, it was held, that when goods of the owners themselves are shipped, they owed freight to the vessel; and though no stipulated freight could be agreed, that the seamen could proceed against the goods *in specie*, to enforce their rights to the amount of a reasonable freight, to be determined *boni viri arbitrio*. I am not ignorant that the doctrine was then considered by some of the profession as somewhat startling, for its supposed novelty and boldness. But after ample time to review and reconsider the subject, I have seen no reason to retract or qualify the doctrine of that case. It is, in my judgment, a just and logical deduction from the peculiar character given by the law to the seamen's contract; and is supported by the highest authority in the maritime law. The owners, says Emerigon, who are shippers in their own vessel, have two qualities which ought not to be confounded. In quality of shippers, they owe a freight to the ship herself; and in their quality of owners, the ship owes a freight to them; and he adds, this freight is pledged to the crew. (*Des Assurances*, c. 17, § 10, *n.* 2.) It constitutes a part of that fortune of the vessel to which the crew are to look for their pay. To them, it makes no difference who owns the cargo. So far as they are interested, there is a freight earned, and to the amount of their wages, it belongs to them.

I am aware of the dictum in the case of *Sheppard* v. *Taylor*, (5 Peters, R. 712,) that "the cargo is not in any manner hypothecated or subjected to the claim of wages." This was

but a dictum, and the point was not necessarily involved in the cause. It may be true that the cargo is not directly, but it certainly is indirectly bound for the wages. For it is a first principle of the maritime law, that the cargo is bound to the vessel for the freight, and another equally ancient and undoubted that the freight is pledged for the wages. Indirectly, therefore, to the amount of the freight due upon it, the cargo is bound for the wages. The master is not obliged to deliver it, until the freight is paid or secured, and if not paid he may sell so much as is necessary to pay the freight. The seamen may, therefore, indirectly, through the master, proceed against the cargo itself, for their wages, to the amount of the freight due. When the owners of the ship are the owners of the cargo, the seamen's claim on the freight can be enforced in no other manner but through the merchandise; and I see no objection in principle or convenience in allowing the seamen to do that directly in their own name, which they may do indirectly through that of the master. Such was evidently the opinion of the English Court of Admiralty in the case of the *Lady Durham*, (3 Haggard, 196.) The Court says that "a mariner has no lien on the cargo, *as cargo*. His lien is on the ship, and on the freight as appurtenant to the ship; *and so far as the cargo is subject to freight he may attach it as a security for the freight that may be due.*" The doctrine maintained in the case of the Spartan seems also to have met the approbation of Judge Conkling. In his learned and valuable treatise on the Law and Practice of the Admiralty, p. 75 – 6, he says that "it is recommended by persuasive considerations of justice, and supported by strong analogies in the undisputed principles of the maritime law."

It appears by the testimony of the master, who was examined as a witness in the case for the respondents, that he has paid over to them, at different times, $600, and that on a cargo of lumber carried for them the freight was $500, which has not been paid to him, but remains as part of the earnings of the vessel in their hands. In addition to this, the freight on the cargo brought home in the vessel on her return to Bath was received and collected by one of the owners, and is now in their hands.

Now every dollar of this money was hypothecated to the

seamen as soon as it was earned, for their wages. To the amount due to them it was their own hard earnings, and whoever received it *as freight*, received it subject to their claims. It is true that when the master pays to a creditor the money which he receives as freight, the seamen cannot follow it into the hands of such creditor. For it does not pass into his hands carrying with it the quality of freight. But to the owners in this case it is paid over, as part of the earnings of the vessel, that is, as freight. It is said, indeed, that it is paid to them, not as freight, but as charter, or the hire, of the vessel. But even admitting, under this contract of hiring on shares, that the master is to be considered as the special owner, that the general owners, as to contracts made by him with the seamen, as well as for supplies, are strangers to the vessel, and that these payments made to them are to be held as payments of charter, and not as payments of part of the freight, there will still remain in their hands all the freight earned on her return voyage to Bath, and $500 which they owe on the cargo of lumber. To this amount they have the earnings of the vessel in their hands, and the seamen might, in a suit against the master, have attached this as freight due.

It is said, if the owners are held liable for the wages, on the ground that they have received freight, that they are liable only in proportion to the amount which they have in their possession bears to the whole amount earned. But if the decision were to be put on this ground alone, the consequence would not follow. The whole freight is hypothecated for the whole wages. And from the nature of the creditor's interest in the thing pledged, it is not subject to this division. Every part of the thing is pledged for every part of the debt, *propter indivisam pignoris causam.* (Dig. 11, 2, 65.) And therefore, if two things are pledged for one debt, and one chance to be lost or destroyed, the hypothecation or lien continues entire for the whole debt in that which remains. (Domat, Lois Civiles, Liv. 3. Tit. 1. § 1. *n.* 13; Pothier de l'Hypotheque, ch. 3, § 1.) *Pitman* v. *Hooper*, (3 Sumner's Rep. 58.)

But it seems to me, that the decision may more properly be put on a broader ground. Where the owners put their vessel into the hands of a master, to be employed by him on shares, I am prepared to hold as a joint deduction from the principles

and general policy of the maritime law, that they will continue liable to the seamen for their wages, notwithstanding the entire control of the vessel may be surrendered to the master, unless the seamen, at the time of their engagement, are notified that the master is to be considered as the sole owner, and that they are not to be liable. The rights of the seamen ought not to be affected by this private agreement between the master and owners. Even if the doctrine of the modern decisions is admitted, and the owners are held not liable to merchants who furnish supplies, there are strong objections to extending the principle to the contracts of seamen. They enter into their engagements, in the confidence that they have the usual and legal securities for their wages. One of these, to which a seaman habitually looks, is the personal liability of the owners. But in this case, there will be in fact no owner, and the only personal security they have is that of the master. Another reason is, that the freight which is paid to the master, is the proper fund for the payment of wages. In the hands of the master, the whole of it is liable for them. But here the freight is from time to time paid over for the hire of the vessel, and only one half of it remains in his hands at the close of their service to respond for their claims. This private agreement between the owners and master, operates as a perfect surprise upon them. My opinion is, that they ought to be held liable as owners.

And further, in my judgment, they are liable for the wages, as receivers of the freight. They have in their hands, according to the evidence, $1100 of the earnings of the vessel, besides all the freight received on the cargo she brought home to Bath. The money that was paid over to them, was, by the very terms of their contract, paid as the ship's earnings, that is, as freight. In its quality of freight, it is liable for wages, in whosesoever hands it may be. It partakes too much of the character of subtlety to call it charter, or the hire of the vessel. It is more consistent with justice, and I think quite as much so with the analogies of the law, to leave to it the name, which the parties themselves have given it, and under that name the seamen have a right to receive their pay from it. If, indeed, the respondents were to be held liable simply as receivers of the freight, it might be necessary to amend the libel, by making

the master a party, and then the services on them would operate as an attachment of the freight in their hands; and if I thought it necessary, I should not hesitate to allow an amendment to meet this posture of the case; but in my opinion it is not.

Independent of all these considerations, my opinion is, that the respondents are liable on their express promise. When the libellant presented the order of the master, a part of it was paid, and a promise given to pay the residue. The libellant had a right to consider this as a distinct admission of their liability. If this order was to be considered as a piece of commercial paper, and the principles of the commercial law to be applied to it, they would be liable upon it as acceptors. For an acceptance may be by parol, or may be inferred from the conduct and acts of the party. (Story — Bills of Exchange, § 243.) In reliance on this promise, the libellant forebore to commence proceedings against the vessel or the master. It is now too late for the owners to deny their liability.

In every point of view, I think the libellant is entitled to a decree for his wages.

Wages decreed, $103.12.

Supreme Judicial Court of Massachusetts.

JAMES MCHUGH, Petitioner.

A person who had been surrendered on complaint under Rev. St. ch. 49, was surrendered by his bondsmen. Subsequently, the usual decree of affiliation was passed, but no steps were taken to enforce it. After the expiration of one hundred and fifty days, the party was discharged, on petition.

THE petitioner had been brought before the police court, on the complaint of Bridget McMarriman, under the bastardy act, (Rev. Stat: ch. 49,) and had given bond, in pursuance of said act, to appear at the court of common pleas. After a default, but before a final decree, he was surrendered in that court by his bondsmen, the bond discharged, and the petitioner committed as upon surrender by bail. After this committal the court passed the final decree of affiliation and support in the

usual form, but no steps were taken to enforce the decree, and the petitioner was not committed for non-compliance with it.

At the expiration of ninety days of imprisonment, the petitioner applied for the benefit of the poor debtor's oath; but was refused by the justices, on the ground that they were authorized, by statute, to administer the oath, in these cases, only to "any man who shall have been imprisoned ninety days for having failed to comply with any order of the Court;" that the petitioner was not committed for non-compliance with any order, but, as appeared by the *mittimus*, peremptorily upon surrender of bail.

The petitioner then applied to the supreme judicial court for a writ of *habeas corpus;* but the justice who sat at *nisi prius*, held that, the petitioner having been committed by legal process, this was not one of the cases in which the writ was demandable *of right*, and in the exercise of his discretion he refused to grant it.

The petitioner then applied to the court of common pleas for a discharge from custody, on the ground that he was committed by order of that court, upon surrender by bail, and had been in custody more than the thirty days limited by statute for the detention of persons so committed in civil causes. The court refused his petition on the ground of want of jurisdiction.

On Saturday, June 2d, the petition was re-heard before the full bench of the supreme court.

FLETCHER, J. The Rev. Statutes, chap. 49, § 1, after providing that the putative father may be brought, by a warrant, before a justice of the peace, adds, that the said justice, "after hearing him in his defence, may require him to give bond with sufficient sureties, to appear and answer to the said complaint, at the next court of common pleas, and to abide the order of court thereon, and may order him to be committed, until such bond shall be given." Section second provides, "that if the sureties in the bond shall, at any term of said court, object to being any longer held liable, or if the court shall, from any cause, deem it proper, the court may order a new bond to be taken; and the defendant shall stand committed until he give such new bond."

This is a statute provision for a bond; it is distinct from

bail, which is a matter of common law, and only regulated by statute. Upon the withdrawal of bondsmen, the court may order a new bond to be given, and the defendant to be committed for non-compliance with the order. But the court below treated this as a surrender by bail; and issued a peremptory *mittimus*, without requiring or authorizing the defendant to give a new bond. For such a *mittimus* the court below had no legal authority. On this ground, therefore, we are clearly of opinion that the petitioner was illegally committed, and that the writ must be granted.

But, even if the court below had followed the requirements of the statute, the committal would only have been for non-compliance with the order to give a new bond. This bond, and the committal for want thereof, being only preliminary, and to secure his appearing and abiding the orders of the court, are superseded by the final decree.

How long after such a decree he may be retained in confinement, there is nothing in the statute to determine; but as this is essentially a civil proceeding, we are of opinion that it must be governed by the analogy of other civil cases. The period of imprisonment must be such as, judged by this analogy, would be reasonable. What would be the reasonable limit of imprisonment in such a case, the court is not called upon to decide; but the period of one hundred and fifty days, for which the petitioner has been imprisoned, is clearly unreasonable; and on this ground, independently of the former, the court would have granted the writ.

On the return of the writ, the petitioner was discharged.

Dana and *Parker*, for the petitioner.

Quarter Sessions of Lancaster County, Pennsylvania.

COMMONWEALTH *v.* JOHN HEMPERLY.

A master cannot require menial duties of his apprentice. He is not, however, liable to an indictment in a criminal court for every mistaken exercise of his authority.

THIS was an indictment for assault and battery. The defendant was a house-carpenter, by trade, and had compelled

his apprentice, the prosecutor, to dig the garden in the morning *before* the usual working hours in the shop, and to saw and split firewood for household uses entirely unconnected with the carpentry business, *after* the usual working hours, in the evening. The master had also compelled the boy to clean the pig-pen, and perform other services not connected with the trade of a carpenter. On one occasion, the defendant told the boy he could not remain with him unless he performed these services, and seized him by the collar and threatened to chastise him; and on another occasion, the defendant chastised the boy with a stick about as large as the little finger of the latter. This was for refusing to split firewood, the boy alleging that the axe was out of order. The apprentice thereupon left his master and commenced the present prosecution.

LEWIS, president of the second judicial district, upon consultation with his associates, Judges Grosh and Schaeffer, charged the jury,

1. That a master who takes an apprentice, for the purpose of instructing him in any particular art or trade, has no right to withdraw the time and attention of the apprentice from the proper business which the one is to teach, and the other to learn; and that the highly advantageous condition of an *apprentice* to an art, trade, or profession, cannot be reduced to the level of a *menial* or mere *family servant*.

2. That a master *house-carpenter* has no right to direct his apprentice to *cut and split firewood*, when such cutting and splitting of firewood has no connection with the "art, trade, or mystery of a house-carpenter."

3. That the master has nevertheless a legal authority over his apprentice, and is not liable to an *indictment* in a *criminal court* for every *mistaken exercise* of that authority. To sustain such a proceeding, there must be such proof of cruelty, or impropriety on the part of the master, as shall satisfy the jury that he acted in *bad faith*, and sought the gratification of his own bad passions, and not the establishment of his supposed rights, or the benefit of the apprentice.

4. Where there is no such bad faith on the part of the master, and he diverts the attention of his apprentice from the "art or trade" intended to be learned and taught, and uses his

authority to enforce his commands, under an honest but mistaken claim of right, the remedy is by application to an alderman or justice, and from thence to the sessions, under the act of assembly of 29th of September, 1770; and that statute takes away the common law remedy by indictment for all complaints for "*misuse, abuse, or evil treatment,*" except where the master's conduct shows that he knowingly prostituted his authority as master to accomplish other than a master's purposes.

The jury rendered a verdict of not guilty.

Messrs. Champneys, Frazer, and *Hierter*, for commonwealth.
Mr. Ford, for defendant.

After the decision of the criminal case, the complaints of the parties, made, respectively, under the provisions of the act of 29th September, 1770, (which varies but slightly from those of the English statute of 5th Eliz. c. 4,) came on to be heard. The apprentice complained of ill treatment, and abuse of authority; and the master complained on the ground of the boy's desertion from service. The evidence disclosed the facts stated in reporting the trial of the indictment for assault and battery.

LEWIS, president, stated the law of master and apprentice, as held on the trial of the indictment, and made the following additional remarks and decree.

An apprentice who was bound as such for the purpose of learning the "art, trade, or mystery" of a house-carpenter, and gives his services in consideration of instructions in that trade, is not bound to render any services as a menial or house-servant, and the master has no right to require such services from him, and thereby to withdraw the attention of the boy from the art or trade he desired to learn. That the condition of an *apprentice*, whether to any of the learned professions, or to an art or trade, was highly advantageous, and he could not be reduced, against his consent, to the level of a *menial* or *common house-servant*. Respectable as these last occupations may be, where faithfully pursued, many individuals and families have an aversion to pursuing them, and their feelings and rights should be respected. An *apprentice* to an art or trade

is but a *student*, and he is as respectable in position as a student of law, medicine, or any other profession. Every attempt to reduce him, against his consent, to the position of a house-servant, should be discountenanced, as tending to prevent parents from binding their sons as apprentices to honorable and useful industrial pursuits. The frequency with which children are brought up either without any occupation on which they can rely for support, or in efforts to acquire a knowledge of *professions* for which they were never qualified by taste or talent, has its origin in the customary forgetfulness of the *rights* of the apprentice and *duties* of the master. It is of the highest importance to the interests of society that these rights and duties should be distinctly understood and firmly maintained and enforced by the courts.

It may promote the pleasure and comfort of both parties mutually to accommodate each other and interchange courtesies to a reasonable extent. The master, or his family, may desire attentions and services, occasionally, not connected with the business in which the apprentice is to be instructed; and the boy may desire small sums of money, occasional luxuries, recreations, and innocent amusements, which he has no right to exact. But it should be understood that these indulgences stand upon courtesy alone. When this is fully understood by each, mutual advantage will substitute the law of kindness for the rule of right, in all cases where the substitution would be beneficial.

In this case, the master had no right to demand the services of the apprentice, in matters not connected with the trade which the one was to teach and the other to learn, and violated his indentures in forcibly compelling the apprentice to render such services, from time to time, as the master's convenience required, during the whole period that the boy remained with him. For these reasons, the apprentice is discharged from his apprenticeship, and from the articles, covenants, and agreements of his indenture of apprenticeship.

Apprentice discharged.

Recent English Decisions.

Court of Chancery.

His Royal Highness Prince Albert *v.* Strange.[1]

The author or composer of any works of literature, art, or science has in such works, so long as they remain unpublished, that exclusive right of property which entitles him to the injunction of this court to restrain any person, not having any title to the works, from publishing any list or descriptive catalogue of such works.

Where the possession of the subject-matter about to be published originated in a breach of trust, confidence, or contract, this court will interfere by injunction to restrain the publication of such subject-matter.

Circumstances under which possession by means of a breach of trust was presumed.

The principles upon which this court acts in applications for injunctions, where the protection of the court is sought on the mere ground of legal right, are different from those upon which it acts where the original jurisdiction of the court is appealed to, as in cases of breach of trust, confidence, or contract.

The facts of this case may be briefly stated. The Queen and Prince Albert, having learned the art of *etching*, executed from time to time, for their private use, several works of this description, some from drawings by themselves, some from other works of art in their possession. They owned a press, upon which with the aid of a printer from the country, they took impressions for their own use from the plates. The plates were occasionally in the hands of the printer, but generally in the possession of Prince Albert. Impressions were sometimes, but rarely, given away. Of some impressions, it is certain that copies were never given. Under these circumstances, "*A Descriptive Catalogue of a Gallery of Etchings*,"—a pamphlet of some thirty pages—was printed by the publisher (the defendant) containing a list of about sixty-four of the impressions already alluded to, and which were etched partly by her majesty and partly by the prince. This catalogue comprised a description of the etchings with some very energetic commendations. The cover was emblazoned with an impression of the royal arms of England, and contained the names of the royal pair, and

[1] An abstract of the decision of this case in Vice Chancellor Sir Knight Bruce's Court was published in a late number, (2 Law Rep. N. S. 40.) The report given above is from the 13 Jurist, (London) 109.

announced that every purchaser would be presented "by permission" with a fac-simile of the autograph of either. An introductory essay, headed by another emblazonment of the royal arms, stated the contents of the work to be "a collection of etchings perfectly unique, executed by" the queen and prince "which the proprietor (no name given) has been induced to submit to public exhibition." After some anecdotes, selections from the newspapers, and some high-wrought compliments, it was stated that the selection was "now submitted to the inspection of the public, under the firm persuasion, and in the full confidence that a numerous class of persons" would appreciate them, and so on. It concluded with an intimation, in poetry, that the abstaining from publishing the pamphlet would be worse than theft. There was no pretence, whatever, that the publication was authorized in any way.

On the 20th October, 1848, an injunction was obtained in Sir Knight Bruce's Court, against one of the defendants, (subsequently amended so as to include both) to restrain the publication or exhibition of the "descriptive catalogue." A motion to dissolve the injunction having been refused by the Vice Chancellor, it was now renewed by way of appeal.

James Russell, *Rolt*, *Samuel Warren*, and *S. Smith*, in support of the motion to discharge the injunction.

James Russell. The only part of the injunction which we seek to dissolve is that which restrains Strange from selling or in any manner publishing, and from printing, the descriptive catalogue in the bill mentioned, or any work being, or purporting to be, a catalogue of the said etchings. The case made by the bill is, that some of the etchings were made by the prince and some by her majesty: there is no attempt to identify those which were made by the prince; the injunction, therefore, extends to some parts of the catalogue in which the prince has no legal interest. There has been such a publication of these etchings as in the case of an invention would vitiate a patent. It is stated in the plaintiff's bill that the etchings have been hung up in the apartments at Windsor; and moreover, that some of them have been presented to private friends of her majesty and the prince — one to one person and one to another.

[*Lord Chancellor.* Do you mean to contend, that if an inventor imparts his knowledge of an invention to a friend, that prevents the validity of a patent subsequently taken out?] We concede the right of property in some of the etchings to be in the prince; but we say, that, by publishing this catalogue, we do not interfere with any right in the prince. The law of England cannot prevent a party obtaining knowledge through the medium of perceiving these etchings, from using that knowledge, and from conveying that information to another person or to other persons. It is contended, that, by so doing, you are making public what a person has done without his permission. If this were a good argument, to what an extent might it be pushed: the public press could not properly communicate any acts or movements of a person unless with his consent. In *Gee* v. *Pritchard*, (2 Swanst. 402,) Lord Eldon, at p. 413, expressly stated that the only ground upon which an injunction could be sustained against publishing the letters was the property in the letters. And in his Lordship's language we may say, "Has the bill stated facts of which the court can take notice, as a case of civil property, which it is bound to protect?" The other side say, "Yes, because privacy is essential to the right of property:" this is the fallacy of their argument. No doubt the owner of any thing may use every means in his power to prevent that thing being seen by another person, but if that other person sees it, the owner can have no right of property in the notion or idea created in the mind of the person who has seen it. There is no analogy between such a case and the case of letters from A. to B., in which the right of property is in A. So, in the case of *Abernethy* v. *Hutchinson*, (3 Law Journ. 219,) the defendant was using the very words of Mr. Abernethy. The question was, whether a lecturer had any right of property in his lectures, which had not been reduced into writing before being delivered. It was evidently considered that the case was weak upon the original bill; for it was amended, by stating that no person was allowed in to hear the lectures, except upon payment of an admission fee, and upon an implied contract that no public use was to be made of the information to be derived. That case is not applicable to the present. Suppose a painter, by his art, describes a particular scene in a poem, and thereby awakens the same idea as the

poet, could the artist be restrained? No doubt, if a person printed the poem, he would be restrained. The difference is this — the poet has a property in the words, the painter in his painting, but neither of them in the *ideas* created by their works; a sculptor might embody in marble the same ideas as those created by the painter. The Vice Chancellor rested his judgment entirely upon the right of a person to retain his property in a state of privacy: this I admit; but I say there is no property in the ideas created by seeing the etchings — the property is confined to the etchings.

Rolt. This injunction, so far as it relates to the catalogue, can only be supported on one of two grounds: first, that the plaintiff has a property in the publication that is restrained; or, secondly, on the ground that there was either an express or implied contract that the defendant would not make any public use of the knowledge which he has obtained by having seen these etchings. There are distinct properties, independent of each other, in the owner of portraits: first, there is the right of property in the canvas; secondly, in the form that adorns the canvas; thirdly, the knowledge of the existence of what he possesses. Now, supposing that the owner of a collection of pictures allows the public on certain days to view his collection, and by this means one of the visitors acquires a knowledge of the paintings the same as the owner, has not such person, in the absence of contract to the contrary, a right to make use of that knowledge? No doubt he would be restained from using the form, but not from describing the attributes created by the form. There is no greater right of property in the knowledge, in the owner of the collection, than in any stranger who may have had access to them. Neither would the case be altered had the knowledge been acquired by viewing a portrait that had been stolen; it is clear, that though trespass might be brought for the entry, or trover for the chattel, neither form of action could be brought in respect of the knowledge; nor will a court of equity, in the absence of contract, interfere with the use of that knowledge. Knowledge is the gift of God, and God alone can deprive the possessor of it. None of the authorities that were cited in the court below will be found to interfere with my propositions, if the distinction

between the property in the thing and the property in the knowledge be observed. The cases of unprinted manuscripts, dramatic performances, and lectures, all proceeded upon the ground of the ideas being communicated by words, which were the property of the writer or lecturer: if the subject has been reduced into writing, then the author has a copyright in the work. This was the case of *Macklin* v. *Richardson*, (Amb. 694.) *Murray* v. *Elliston*, (5 B. & A. 657,) was the converse of the last case: there, the play of "Marino Faliero" had been published, and the action was brought to recover damages for the injury done by representing it upon the stage. It was not argued in that case, that the action would not lie, on the ground of the play, as acted, being an abridgment, but upon the ground, that, the knowledge having been acquired from the book, the ideas thereby created might fairly be represented upon the stage. *Tipping* v. *Clark* (2 Hare, 383) proceeded upon the ground of an implied contract between a clerk and his employer, that he would not impart a knowledge of the contents of the account-books to other persons. This brings me to the question — has the defendant's knowledge been acquired under any implied contract that he would not make any public use of it? To know upon what ground this question is to be discussed, it will be necessary to have your lordship's decision as to the admissibility of certain affidavits which were filed, on the part of the plaintiff, after the injunction was obtained. These were rejected by the court below, but it will now be attempted to introduce them. [*The Solicitor-General.* The Vice Chancellor rejected them, on the ground that there had not been sufficient notice given of plaintiff's intention to read them.] The Vice Chancellor, after argument, rejected them, and the judgment proceeded upon the exclusion of that evidence; and the plaintiff has not appealed from that judgment. The rule of the court is, that, if a party move for an injunction, which is refused, and then come here, they may show other grounds for the injunction, as upon a new motion; but where the injunction is obtained, and the defendant comes here to discharge that injunction, it cannot be supported upon fresh evidence: it is then strictly an appeal motion. *Edwards* v. *Jones*, (1 Ph. 501); *Hilton* v. *Lord Granville*, (4 Beav. 130.)

Lord Chancellor. If this is an appeal motion, I must take it upon the evidence that was before the court below.

The Solicitor-General and *James*, contra. When the original bill was filed, the precise manner in which the copies of the etchings had come to the possession and knowledge of the defendant was not known, and it was only alleged generally, that they had been surreptitiously obtained. The injunction was obtained upon that statement; afterwards the bill was amended, by stating the mode in which the defendants obtained the copies. The defendant, by his answer, only ignored the facts introduced by way of amendment; and these affidavits we now desire to read, to prove how the etchings came to the possession of the defendant. We rely upon the case of *Jefferys* v. *Smith*, (1 J. & W. 298.) This is not like *Edwards* v. *Jones*. There it was to verify a matter of title; here it is merely to prove the existence of an implied contract.

Rolt. This is not like the case of *Jefferys* v. *Smith;* there the injunction was moved for after answer, and the answer did not notice some of the allegations in the bill. Here the injunction was obtained ex parte on the original bill, which was afterwards amended by order, without prejudice to the injunction; but that order cannot *benefit* the injunction. The other side say that the affidavits are not produced as evidence of the plaintiff's title; but, I submit, that is not so: the very argument on the other side depends upon the question, whether the etchings, which were shown to the defendant, were the property of the person who showed them. I submit, that affidavits in evidence of the plaintiff's title cannot be admitted in support of the injunction, although the answer merely ignored the allegations in the bill.

Lord Chancellor. I have no doubt whatever as to the practice in this case; and by it I am bound to reject these affidavits. The rule of the court is as has been stated by Mr. Rolt. The order for leave to amend, without prejudice to the injunction, enables the plaintiff to amend his bill for the general purposes of the suit, but it leaves the injunction as it was. No doubt, if an injunction be obtained on an amended bill, affidavits

in support of the case made by the original bill will be admitted, although those facts were not known at the time of filing the original bill; but the case here is, to support the injunction upon the original bill. Affidavits rejected.

Rolt continued his argument on the motion. No case of privity, or of any implied contract, was made out between his royal highness Prince Albert and the defendant. The injunction was not obtained upon the ground of any confidence being reposed by his royal highness in Brown, but upon the ground that some person surreptitiously obtained copies of the etchings from the private apartments at Windsor. [*Lord Chancellor.* There may be no privity between the owner and Strange, but suppose the facts show that there was an implied contract between the owner and another party?] That would not affect Strange if he had no notice of it; it cannot be treated as a purchase of a chattel; it is a knowledge acquired by a power given by God; it is like lighting my torch at your torch — you are nothing the poorer. It has not been shown, that, by any custom of the printing trade, it was a fraud for any of the servants to retain a waste copy. The case before the Vice Chancellor simply raised the question, whether the right of property in the etchings created a property in the knowledge acquired from those etchings, irrespective of any contract or confidence.

S. Warren. Where there is any doubt as to the legal right of a plaintiff, your Lordship is in the constant habit of refusing to interfere by injunction until that right is established at law. *Spottiswoode* v. *Clarke*, (2 Phil. 154); *Rigby* v. *The Great Western Railway Company*, (Id. 44.) It is well settled, that a person may obtain as good a title to an abridgment as the original composer had in his work. *Saunders* v. *Smith*, separate report by Mr. Crawford, 1838; *Gyles* v. *Wilcox*, (2 Atk. 141); *Martin* v. *Wright*, (6 Sim. 297.) The other side must contend that the composer of this catalogue has no title to it, and that the prince has. It is said by the other side, that privacy is an adjunct to property; but, I submit, it is a mere imaginary adjunct. *Chandler* v. *Thompson*, (3 Camp. 80.) What form of action could be brought for a mere matter of privacy? The only form would be an action on the case — there would be no allegation of property — there could be no allega-

tion, but that it would be offensive to the plaintiff. Such an action could not succeed, (*Aldridge's case*, 9 Co. 58. a.); it is for the plaintiff to show that it could. This court will not interfere on the ground of private feelings, nor even on the ground of a publication being of a libellous nature. *Southey* v. *Sherwood*, (2 Mer. 435.) Vice Chancellor Knight Bruce, in deciding this case, lost sight of the principles of jurisprudence in pursuing those of ethics. [He referred to Mackilday's Modern Civil Law, (123, note).]

Lord Chancellor. One part of the injunction is against the exhibition of the etchings; and the defendant submits to that part of it. Now, the catalogue is an announcement of the exhibition. Have you any instance in which the court has permitted the announcement of the very exhibition which, it is admitted, is properly restrained?

S. Smith. The injunction not only restrains this particular catalogue, but any other which might be made out.

The Solicitor-General, *Talfourd*, Serjt., and *W. M. James*, contra.

Solicitor-General. We do not seek to support this injunction upon any grounds of public morals or private feelings: we rely merely upon the principles of ordinary law. First, that the court of chancery will in all cases protect every one in the use of his property, or will prevent another person from doing an injury to that property, or from interfering with the use of that property. Secondly, that the court recognizes a property in unpublished matters, and that incidental to that property is the right to make them public, or to keep them secret. It is perfectly clear, that the right of publication is a matter that can be sold: it has, in fact, a corporeal existence, which is protected by the common law of England *Donaldson* v. *Becket*, (4 Burr. 2408); *Millar* v. *Taylor*, (4 Burr. 2378.) We claim no right of property in the catalogue — we only claim the right of property in the etchings, and, incidental to them, the right of making them public; and we say, the catalogue interferes with and injures that latter right. [He then cited the cases of

The Duke of Queensbury v. *Shebbeare*, (2 Eden, 329); *Pope* v. *Curl*, (2 Atk. 342); *Southey* v. *Sherwood*, (2 Mer. 435); *Thompson* v. *Lord Chesterfield*, (Amb. 737); *Gee* v. *Pritchard*, (2 Swanst. 413); *Percival* v. *Phipps*, (2 Ves. & B. 19); *Lord Granard* v. *Duncan*, (1 B. & B. 207); *Abernethy* v. *Hutchinson*, (3 Law Journ. 219); *Green* v. *Folgham*, (1 S. & S. 398); *Govatt* v. *Winyard*, (1 J. & W. 394); *Newbury* v. *James*, (ubi sup.); *Macklin* v. *Richardson*, (ubi sup.); and repeated his arguments in the court below. (See ante, p. 49).] In *Martin* v. *Wright*, (ubi sup.) the painting had been made public; but suppose Wright had, before the exhibition of it by Martin, copied and exhibited it, could it be doubted that this court would have interfered? The other side were about to argue this case by analogy to inventions, but your lordship threw out a doubt whether they were not putting the case too high. It is an every-day occurrence that one invents, and another finds the money for obtaining and working the patent; but it could not be contended for a moment, that, by the inventor imparting his knowledge to that other individual, he has lost his right of property. Is not this so, then, in every product of the mind? If a work be published, you may translate or you may abridge it; but if it be not published, you have no right either to translate or abridge it; why, then, are you to be at liberty to make an abstract or catalogue of the contents? [He then commented on the original affidavits and the answer of the defendant, and contended, that it was clear that the etchings had been improperly obtained from the palace, or by means of a breach of trust committed by Brown or some of his servants; citing *Abernethy* v. *Hutchinson*, (ubi sup.); *Brison* v. *Whitehead*, (1 S. & S. 74); *Tipping* v. *Clarke*, (2 Hare, 383); and chief justice Wilmot's judgment in *Bridgman* v. *Green*, (Wilmot's Cases and Opinions, p. 64,) to show that a party becoming so possessed does not acquire any right of property therein.] It is contended, that every possessor of knowledge has a right to make that knowledge public. Is this so? Suppose a solicitor obtains a knowledge of a defect in a title to an estate, could it be contended that he has a right to make that public? *Cholmondeley* v. *Clinton*, (19 Ves. 261.) The other side contend, that there has been a publication of these etchings, by single copies having been given away to private

friends of the owners; but I submit, on the authority of *The Duke of Queensbury* v. *Shebbeare*, *Macklin* v. *Richardson*, (ubi sup.) and *Colman* v. *Wathen*, (5 T. R. 245,) that this did not amount to a publication.

Talfourd, Serjt. Privacy is not a necessary attribute of all property, but only of some; sometimes, indeed, it gives it its only value. Even Mr. Justice Yates, who differed from the other judges, in *Millar* v. *Taylor*, on the chief question, agreed with them all upon the incidental question, namely, that so long as an author reserved his works in an unpublished state, he had the absolute right to keep them private. The argument of the other side would apply to the etchings themselves. Can it be said, that any person has the right to drag before the public the work of another, who has thought proper to shroud it with obscurity? When once a work is published, it is the right of the public to censure or criticize it. I am asked whether an action on the case would lie; and I reply that it would, and that it is a constant thing to have actions on the case for new wrongs, and that it is unnecessary to have a precedent for it. In *Abernethy's case*, Lord Eldon granted the injunction on the ground that this court would restrain any act affecting the value of the property.

W. M. James referred to Lord Henley on Injunctions, (p. 275,) where he refers to the case of Mr. Webb's unpublished Conveyancing Precedents having been stolen, and an injunction having been granted against publishing them: and contended, that if the thief, instead of publishing them *in extenso*, had published an abstract of them, which might have been even a more valuable work, the court of chancery would undoubtedly have restrained the publication.

[In the course of the arguments, the Lord Chancellor several times observed upon the fact of the catalogue holding forth to the public that which was admitted to be false, namely, that every purchaser of the catalogue would be presented ("*by permission*") with a fac simile of the autograph of either her majesty, or the prince consort.]

Russell, in reply. A false or inaccurate statement in a

publication does not give this court any jurisdiction to restrain that publication. We have a copyright in this catalogue, and if any person republished it we would have an action at law. No answer has been made to our argument, that this injunction is too extensive, the prince being a stranger in law to a great number of the etchings. As to some of the prince's etchings, his royal highness can have no property *in the idea*, for some of them are but copies from old masters; take, for instance, No. 49. "Heads of Eagles, from a painting of Ganymede." [*Lord Chancellor*. Has he not a right to the copy, and that no person shall copy that copy? Suppose a person copies a landscape, is he not to have an actual title to the copy from nature?] That would be an original work; the mind would take some objects and reject others. I admit the full right of an author to his unpublished work; but I submit that it is questionable whether that right would extend so as to prevent an abridgment of an unpublished work. [*Lord Chancellor*. That was Abernethy's case; the court came to the conclusion that there was no publication, only a qualified publication.] I submit that here there has been a publication; and, further, that etchings come within the meaning of material productions, and not within the meaning of unpublished works.

February 8. Lord Chancellor. The importance which has been attached to this case arises entirely from the exalted station of the plaintiff, and cannot be referred to any difficulty in the case itself. The precise facts may not have occurred before; but those facts clearly fall within the established principles, and the application of them is not attended with any difficulty. The right of the plaintiff to an injunction to restrain the defendant from exhibiting, copying, or in any manner publishing or parting with, or disposing of, any of the etchings in question, is perfectly clear from the facts of the case, and is not now disputed by the defendant; and the only question I have to decide is, whether, this right being so established and admitted, the defendant is to be permitted to publish the catalogue in question, in which he announces his intention of exhibiting the etchings which he is so restrained from doing, and in which he announces to the public that "Every purchaser of this catalogue will be presented (by permission) with a fac simile of

the autograph of either her majesty or of the prince consort, engraved from the original, the selection being left to the purchaser." Now, as permission, so to accompany each catalogue sold, necessarily implies permission to sell the catalogue itself, the case is complete of an intention to sell under a false representation, that the whole transaction is not only with the knowledge, but with the approbation, of the plaintiff — a falsehood which could only have been resorted to for the purpose of imposing on the public. Now, as all manufacturers are, as a matter of course, restrained from selling their goods under similar misrepresentations, tending to impose on the public, and to prejudice others, it seems singular that the court should be asked to dissolve the injunction which prevents the defendant from selling or publishing this catalogue. It is true, however, that as the injunction extends to restrain the defendant from publishing "any work, being, or purporting to be, a catalogue of the etchings," it is to be considered whether, under the circumstances, the defendant has any right so to do. In considering this, I shall not regard the fact, that the defendant submits to the injunction against exhibiting, publishing, or parting with, the etchings described in the catalogue; and that the other defendant, the author and compiler, and joint proprietor with the defendant, of the catalogue, as the defendant states in his answer has submitted to the whole of the injunction, from part of which the defendant asks to be relieved. Let it be supposed that an injunction were now asked for, in the terms of the injunction sought to be dissolved, the case would stand thus: — The affidavits filed before the answer show that the etchings in question were the works of the plaintiff, and retained as his private property, not published or intended for publication, some of them only having been given to private friends; that the collection described in the catalogue could only have been made by impressions surreptitiously and improperly obtained; that the "catalogue and the descriptive and other remarks therein contained, could not have been compiled or made except by means of the possession of the several impressions of the said etchings so surreptitiously obtained as aforesaid." By the last affidavit of Mr. White, a fact was made known to the defendant, that upon one occasion some of the plates were sent to a Mr. Brown, a printer at Windsor, for the purpose of having some impressions

taken for private use, and that the plates and all the impressions so ordered were returned by Mr. Brown. The answer does not in any manner question, qualify, or vary the case so made, but simply states, the defendant did not know or believe that the copies had been improperly obtained; and that judge, who was in the possession of them, did, as the defendant believes, purchase them of one Middleton; but states nothing as to how Middleton obtained them, and states nothing as to Brown, so called to his attention by Mr. White's affidavit. The result is, that the case stated by the affidavit is not met by the answer; and the answer does not set up any title adverse to the case so made. But in this state of things the defendant insists that he is entitled to publish a catalogue of the etchings — that is to say, to publish a description or list of works or compositions of another, made and kept for the private use of that other, the publication of which was never authorized, and the possession of copies of which could only have been obtained by surreptitious and improper means. It was said by one of the learned counsel for the defendant, that the injunction must rest on the ground of property or breach of trust. Both appear to me to exist in this case. The property of an author or composer of any work, whether of literature, art, or science, in such work unpublished, and kept for his private use or pleasure, cannot be disputed, after the long line of decisions in which that proposition has been affirmed or assumed. I say "assumed," because, in most of the cases which have been decided, the question was not as to the original right of the author, but whether what had taken place did not amount to a waiver of such right; as, in the case of letters, how far the sending of the letter, — in the case of dramatic composition, how far the permitting the performance, — and in *The Case of Mr. Abernethy's Lectures*, how far the oral delivery of the lecture, — had deprived the author of any part of his original right and property in question; which could not have arisen, if there had not been such original right or property. It would be a waste of time to refer in detail to the cases on this subject. If, then, such right and property exist in the author of such works, it must so exist exclusively of all other persons. Can any stranger have any right or title to, or interest in, that which belongs exclusively to another? — and yet this is precisely what the

defendant claims, although, by a strange inconsistency, he does not dispute the general proposition as to the plaintiff's right and property; for he contends, that, admitting the plaintiff's right and property in the etchings in question, and, as incident to it, the right to prevent publication or exhibition of copies of them, yet he insists, that some persons, having had access to certain copies, (how obtained I will presently consider,) and having, from such copies, composed a description and list of the originals, he, the defendant, is entitled to publish such list and description — that is, that he is entitled, against the will of the owner, to make such use of his exclusive property. It being admitted that the defendant could not publish a copy — that is, an impression — of the etchings; how, in principle, does the case of a catalogue, list, or description, differ? A copy or impression of the etchings could only be a means of communicating knowledge and information of the original; and does not a list and description do the same? The means are different, but the object and effect are similar: it is to make known to the public, more or less, the unpublished works and compositions of the author, which he is entitled to keep wholly for his private use and pleasure, and to withhold altogether, or so far as he may please, from the knowledge of others. Cases of abridgments, translations, extracts, and criticisms of published works, have no reference whatever to the present question. They all depend on the extent and right under the acts with respect to copyright, and have no analogy to the exclusive right of the author in unpublished compositions, which depend entirely on the common-law right of property. A clerk of Sir John Strange having, in his employ, made an abridgment of such of his manuscript cases as related to evidence, was restrained by Lord Hardwicke, in 1754, from publishing it, the cases themselves being then unpublished. Upon the first question, therefore — that of property — I am clearly of opinion that the exclusive right and interest of the plaintiff in the compositions and works in question being established, and there being no right or interest whatever in the defendant, the plaintiff is entitled to the injunction of this court to protect him against the invasion of such right and interest by the defendant, which the publication of any catalogue would undoubtedly be. But this case by no means depends solely on the question of

property; for a breach of trust, confidence, or contract, itself, would entitle the plaintiff to the injunction. The plaintiff's affidavit states the private character of the work or composition, and negatives any license or authority for publication, the gift of some of the etchings to private friends not implying any such license or authority; and states distinctly the belief of the plaintiff that the catalogue, and the descriptive and other remarks therein contained, could not have been compiled, except by means of the possession of the several impressions of the etchings surreptitiously and improperly obtained. To this case no answer is made; the defendant saying only that he did not at the time believe the etchings to have been improperly obtained; not suggesting any mode by which they could have been properly obtained, so as to entitle the possessor to use them for publication. If, then, these compositions were kept private, except as to some given to private friends, and some sent to Mr. Brown for the purpose of having certain impressions taken, the possession of the defendant, or of his partner judge, must have originated in a breach of trust, confidence, or contract in Brown, or some person in his employ, taking more impressions than were ordered, and retaining the extra number; or in some person to whom copies were given, which is not to be supposed, but which, if the origin of the possession of the defendant, would be equally a breach of trust, confidence, or contract, as was considered in the case of *The Duke of Queensbury* v. *Shebbeare*, (2 Eden, 329.) And upon the evidence on behalf of the plaintiff, and in the absence of any explanation on the part of the defendant, I am bound to assume, that the possession of the etchings or engravings on the part of the defendant or judge has its foundation in a breach of trust, confidence, or contract, as Lord Eldon did in *The case of Mr. Abernethy's Lectures*, (as reported in 3 Law Journ. 319); and upon this ground also, I think the plaintiff's title to the injunction, sought to be discharged, fully established. The observations of Vice Chancellor Wigram, in *Tipping* v. *Clarke*, (2 Hare, 393,) are applicable to this part of the case. He says, "Every clerk employed in a merchant's counting-house is under an implied contract that he will not make public that which he learns in the execution of his duty as clerk. If the defendant has obtained copies of books, it would, very probably,

be by means of some clerk or agent of the plaintiff; and if he availed himself surreptitiously of the information, which he could not have had except from a person guilty of a breach of contract in communicating it, I think he could not be permitted to avail himself of that breach of contract." In this opinion I fully concur; and I think that the case supposed by Sir James Wigram has actually arisen, or must, from the evidence, be assumed to have arisen, in the present, and the consequence must be what Sir James Wigram thought would follow. Could it be contended, that the clerk, although not justified in communicating copies of the accounts, would yet be permitted to publish the substance and effect of them? In that, as in this case, the matter or thing of which the party had obtained knowledge being the exclusive property of the owner, he has a right to the interposition of this court, to prevent any use being made of it; that is to say, he is entitled to be protected in the exclusive use and enjoyment of that which is exclusively his own. This was the opinion of Lord Eldon, expressed in the case of *Wyatt* v. *Wilson*, in the year 1820, respecting an engraving of George III., during his illness, in which, according to a note, with which I have been furnished by Mr. Cooper, he said, "If one of the late king's physicians had kept a diary of what he had heard and seen, this court would not, in the king's lifetime, have permitted him to print or publish it." *The case of Sir John Strange's Manuscripts* is also applicable to this point. Some minor points were raised at the bar, to which I will shortly advert. It was contended, that there ought not to be any injunction until the plaintiff had established his title at law; and cases were referred to, in which it was supposed I had laid down rules establishing such a proposition. The cases referred to were cases in which the equitable jurisdiction arose wholly from some legal title, and was exercised solely for the purpose of protecting the party in the enjoyment of such legal title, and have no application to cases in which this court exercises an original and independent jurisdiction, not for the protection of a merely legal right, but to prevent what this Court considers and treats as a wrong, whether arising from violation of unquestioned right, or from breach of trust, confidence, or contract, as in the present case, and in *The case of Abernethy's Lectures*. But, even in the cases so

referred to, I have always held, that it was for the discretion of the court to consider, whether the defendant might not sustain greater injury from an improper injunction, than the plaintiff from delay in granting it. In the present case, where privacy is the right invaded, postponing the injunction would be equivalent to denying it altogether. The interposition of this court in these cases does not depend on any legal right, and to be effectual it must be immediate. It was then observed that the injunction was too extensive, as it applied to any catalogue of the etchings in the bill mentioned; and the plaintiff had shown a title only to some of the etchings there mentioned. If the defendant had any interest in this matter, the objection would deserve consideration; but it is clear he has none, being already under an injunction as to all those etchings to which the plaintiff has not shown a title in this case:[1] so that, while the other injunction continues, he could derive no benefit whatever from any alteration in the terms of this injunction; and, if any such alteration were made, it would not affect the question of costs, that not being the object of this motion, which must, therefore, be refused, with costs. Motion refused, with costs.[2]

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[1] His Lordship here alluded to a similar injunction which had been obtained against the defendant, in the information *The Attorney-General* v. *Strange*, which had been filed for the purpose of protecting the interests of her majesty in those portions of the etchings which were the property of her majesty.

[2] The decision of the Vice-Chancellor Knight Bruce, in the case of *Prince Albert* v. *Strange*, has been affirmed by the Lord Chancellor, not only on the ground on which we understand his honor to have proceeded, namely, the ground of there being such a right of property in the plaintiffs as to entitle them to prevent the publication of a catalogue of their works; but also on two grounds which we do not recollect to have influenced the Vice Chancellor, namely, the ground, as regards the particular catalogue referred to in the pleadings, of fraud in the defendants as against the public; and, as to the general question of publishing any catalogue, on the ground of fraud in the defendants in obtaining their information. On the question of property, his Lordship did not go into any lengthened argument, but laid down the principle, as we collected it, thus: — That the author of literary compositions, or the like, has an undoubted property in them, which entitles him to withhold them from being made public; that when a person takes and makes public copies of such works, which, it is admitted, he may not do, he is but taking one mode of conveying to the public knowledge or information of the originals; and that, in publishing a descriptive catalogue, he is only taking another mode of conveying such knowledge or information to the public; that, in both cases, he is giving to the public a knowledge of the unpublished works of an author, which he has a right to withhold and keep for his own use and pleasure.

The principle laid down by this decision is very important, and may have some singular consequences. For although, in legal phraseology, the right established is expressed to be a right of property in a man's own *works*, it is impossible not to see that

it is, in effect, a right of privacy — a right of withholding from the public a knowledge of what one has done in the way of literary or other composition. For when the Lord Chancellor speaks of the publication of a catalogue of works being a mode of conveying to the public knowledge of those works, his Lordship, we apprehend, does not, and cannot, mean that it makes the works themselves known, but only that it makes known the fact of their existence, and, generally, what is the subject-matter of them; and when his Lordship holds that there is no substantial distinction between the two acts — that of conveying knowledge by copies and conveying it by catalogues — his Lordship must, we apprehend, be understood to mean, not that there is no substantial distinction as to the nature of the knowledge or information, but none as to the interference with that which his Lordship holds to be the right of the author, namely, the right of withholding from the public not only his work, but all knowledge of or respecting it. The right, therefore, established by the decision of the Lord Chancellor, in *Prince Albert* v. *Strange*, is a right in the author of any composition capable of being made the subject of copyright, (if he has manifested an intention not to allow the public to have any knowledge of it,) to restrain any person, whether affected or not by confidence, from publishing to the world any information whatever respecting such author's productions. Whether the Lord Chancellor meant to extend the doctrine to the making manifest to the public any other property of which the owner may desire to keep the knowledge to himself — with reference, for example, to such cases as those put by the Vice Chancellor, of collections of gems, or the like — does not appear from the Lord Chancellor's judgment; but it seems difficult to see how the doctrine should not be applicable to the cases put by the Vice Chancellor; and the result will be, that, if one has a collection of valuable or choice things of any kind, and manifests an intention of preventing the public from having any knowledge of them or their existence, it will be unlawful for any person, who, by the neglect of the owner or otherwise, may have had communicated to his senses the knowledge of their existence, to communicate that knowledge to the world. A material point, in any questions which will have to be considered with reference to this case, will be, what amounts to a dedication by an author to the public; because the foundation of the decision is, that the author desires that his work shall not be made public, and has done no act to make it public. In *Prince Albert* v. *Strange*, the plaintiffs had undoubtedly suffered their etchings to escape from perfect concealment — that is, they had entrusted them to a servant, (in confidence, it is true,) and that servant had, by his neglect, allowed a stranger to obtain a sight of them. This, however, was not, under the circumstances, held to be a dedication to the public; principally, we apprehend, because the plaintiffs having alleged and sworn to circumstances showing that the etchings could only have been obtained by surreptitious, namely, fraudulent means, the defendant did not specifically deny the allegation, and account for the mode in which the etchings had been obtained, but only averred in general terms his belief that they had been honestly obtained — an averment which obviously gave no information to the court, and was no more than an expression of opinion, since, in the defendant's notion of honesty, it might be honest to obtain the etchings by surreptitious means.

But put the case, that the defendant had sworn distinctly that copies of the etchings had been shown to him by a person of such station as to make it probable that he had a right to show them, and with distinct liberty to make a catalogue of them; or put the case, that the plaintiff's servant had left the etchings exposed publicly in the street so that any stranger passing by might see them and make a catalogue of them; would such a state of things amount to a dedication to the public sufficient to waive the right of concealment of the author, and let in the right of the percipient to use his senses, and acquire knowledge and use it? These and many other questions will arise, no doubt, in the cases that will follow the case of *Prince Albert* v. *Strange*; and, in the meantime, all that can be said is, that, where an author has not dedicated his works to the public, any other person will be restrained from communicating to the public, not only the works themselves, but the fact of their existence, and the particular designation of their mode of existence. — *London Jurist, February* 10.

Abstracts of Recent American Decisions.

Supreme Court of Alabama, January Term, 1849.

Little v. *Knox. Administrators' Bonds.* If administrators execute a joint bond, they are liable for the acts of each other, and both are bound to protect the joint securities from the consequences of the acts of either.

An execution issued on a judgment of the orphans' court against an administrator, which is not made returnable to a regular term of the county court, is void, and a return of "no property" on such an execution will not authorize the issuing of an execution on the administration bond against said administrator and his securities.

Royston v. *Howe. Principal and Surety.* A direction by the plaintiff to the sheriff without consideration to stay proceedings on an execution against the principal debtor, does not discharge the surety from the payment of the debt.

The creditor is not estopped from showing the truth of the matter, because he may, under a mistaken view of his legal rights, have said that the arrangements made with the principal had discharged the security.

Hambleton v. *Adams. Equity Jurisdiction.* A court of equity cannot interpose by injunction to restrain the plaintiff, who has obtained judgment on a writ of forcible entry and detainer, from having restitution to the possession, notwithstanding he is insolvent, and the complainant holds the undisputed legal title to the land.

The Governor, &c. v. *Jackson. Sheriff's Recognizance.* A recognizance taken by a sheriff from a defendant whom he has arrested under a capias, on a charge of felony, is void.

Bush v. *Bradford. Bill of Sale — Error — Evidence.* An instrument which acknowledges the payment of the consideration money for certain personal property therein described, though in a former receipt, is in effect a bill of sale.

If a bill of sale of blooded stock contains no warranty, express or implied, beyond that of title, parol evidence is inadmissible to add to it a simultaneous verbal warranty of age and soundness.

An error that works no injury to the party complaining of it, is not a ground of reversal in an appellate court.

Where testimony is introduced by a defendant, tending to prove false representations by the plaintiff in a sale of blooded stock as to age and soundness, it is competent for the plaintiff to repel the presumption of fraud, to show that he informed the defendant after the sale, of an error in said representations, and offered to take back the property, which offer the defendant rejected.

State ex rel. Walker v. *Judge of Orphans' Court in Macon County. Injunction — Mandamus.* Where the judge of the orphans' court is advised

that an injunction has been granted at the instance of the executor of an estate, to restrain the heirs and distributees from proceeding with a settlement begun in said court, it is a sufficient reason why he should suspend all further proceedings so long as the injunction continues in force.

An appellate court will not in an indirect proceeding undertake to decide upon the equity of a bill in chancery or the propriety of an order made thereupon.

A mandamus will not be granted to command an inferior tribunal to do that which it could not legally do without such mandate.

Where the judge of an orphans' court refuses to proceed in the settlement of an estate, should not an application for a mandamus be first made to the circuit court? *Quære.*

Mitchell v. *Robertson. Ejectment — Equitable Estate — Former Judgment.* In an action of ejectment if the plaintiff shows a superior *legal* title, unless estopped from arresting it, he must recover whatever may be the equities of the parties.

Where the purchase money for land is paid by one person, and the deed is taken in the name of *another*, the former acquires but an equitable estate, a sale of which under execution at law vests no title in the purchaser.

A judgment in an action of trespass to try titles is not conclusive either upon the plaintiff or the defendant, in a subsequent suit for the same land.

Givens v. *Kindrick. Trespass.* If G., intending to commit a trespass on the public lands by cutting down and carrying away trees, through mistake cuts down trees on the land of K., he is liable to K. in an action of debt for the penalty imposed by the statute of 1807.

The cutting down of trees on the land of another without his consent, and with knowledge on the part of the trespasser that the land does not belong to him, is sufficient to subject him to the penalty imposed by the statute of 1807, although the trees may not be carried away. (See Clay's Digest, 581.)

Judge v. *Hinkle. Pleading.* A motion to strike out a plea is addressed to the discretion of the court, and its refusal is not a subject of revision in this court.

When a suit is instituted on an administrator's bond against the administrator and his sureties, each may serve and plead as many pleas as he may deem necessary to his defence.

In an action on an administrator's bond against the administrator and his securities, suggesting a *devastavit*, a judgment against the administrator *de bonis intestatis* is not conclusive against the securities, but it devolves on the plaintiff to show an actual *devastavit* in order to fix their liability.

A judgment rendered against an administrator *de bonis intestatis* in an action on a note payable to and endorsed by him in his representative character, is a clerical misprision, and in an action on the administration bond against the administrator and his securities is insufficient to charge the securities for an actual *devastavit* of the administrator.

Carlisle v. *Hunly. Evidence.* Where a party desires to impeach the credit of a witness by proof of statements out of court in conflict with

his testimony, he must first lay the predicate by directing the attention of the witness to the time, place, and person, involved in the supposed contradiction.

Where illegal testimony has been admitted by the court, nothing short of a direct and unequivocal charge to the jury, that they must disregard the illegal proof, can cure the error of its admission.

Bardurant v. *Thompson. Practice.* A judgment or decree cannot be amended upon evidence which does not appear upon the record.

In the settlement of an estate in the orphans' court, the court has no power to allow the set-off of a debt due to the estate by one of the distributees against the share of such distributee.

Previous to the statute of 1839, authorizing administrators to rent the lands of their intestates, the orphans' court had no power to compel an administrator to account for the rent of land of the estate received by him.

Where a sheriff, as administrator *ex officio*, neglects to collect notes due the estate until his term of office expires, he will not be chargeable with the amount thereof, if the makers of the notes were perfectly solvent for a considerable time after his administration closed.

Hooks v. *Branch Bank at Montgomery. Evidence — Practice.* P. C. H. executes a deed of trust to M. H. H. for a number of slaves to protect him from liability as his surety on a note held by the bank; some of the slaves are sold by the sheriff under older liens, and M. H. H. purchases them; the remainder are sold, for the purpose of paying said note by the register, under a decree in chancery rendered on a bill filed by M. H. H. against P. C. H. and A. The bank assents that the register's sale may be on a credit, the purchaser giving notes with approved security; C. becomes the purchaser, and gave M. S. C. and S. as securities, to whom M. H. H. and C. execute a deed of trust on all the slaves as well as those sold by the sheriff as those sold by the register for their indemnity, and in it the previous deed from P. C. H. to M. H. H. is recited. The bank afterwards procures an execution in its favor against P. C. H. founded on another and distinct debt, to be levied on the slaves sold by the plaintiff, and M. H. H. interposes a claim. *Held*,

1st. That the chancery proceedings are not evidence against the bank.

2d. That the assent of the bank to the sale by the register on a credit did not make it a party to the chancery proceedings, nor can it affect its right to subject the slaves levied on to its execution.

3d. That the recital of the deed from P. C. H. to M. H. H. in the deed from M. H. H. and C. to M. S. C. and S., is not evidence to show title in M. H. H., but that if he levied on his deed from P. C. H., he should have proved, not only its execution, but the *consideration* thereof, by legal evidence.

4th. That neither the chancery proceedings, the action of the bank at the register's sale, nor the deed to M. S. C. and S., separately or collectively, could estop the bank from contesting the title of M. H. H. to the slaves in controversy, nor are they evidence to show that the title had passed from P. C. H.

Greene v. *Fagan's Distributees. Rights and Duties of Administrators.*

It is the duty of administrator to defend the estate which he represents against claims which he believes are unjust, and if, under an honest impression that a demand against it ought not to be paid, he incurs expenses in litigating it, they should be allowed him in the settlement of his administration account.

If an administrator having a good defence to a claim preferred against the estate, neglects to interpose it, but suffers judgment to go against him, and in consequence of such neglect he is compelled to resort to further and other proceedings to relieve himself of the judgment, the expenses of such subsequent litigation do not constitute a proper charge against the estate.

If an administrator is aware of a credit, to which the estate of his intestate is entitled on a claim presented against it, but neglects to avail himself of it, and permits judgment to be entered against him for the whole amount of the claim, he is personally chargeable to the estate of such credit.

Where a petition for final settlement and distribution of an estate is filed in the names of the widow and other distributees of the deceased, it is not error to refuse to dismiss it on motion of the widow alone.

A decree rendered by an orphans' court in favor of an infant distributee, should be in his name by his guardian, if he have one, but if it be in his name alone, without the intervention of a guardian, it is not reversible on error.

When an executor is, by a decree of an orphans' court in favor of an infant distributee, without the intervention of a guardian, ordered to issue thereon, the award of execution is erroneous.

Since the passage of the act of March, 1848, "securing to married women their separate estates and for other purposes," a decree of an orphans' court for the distributive share of a married female distributee, should be in the name of the husband and wife for the use of the wife.

Scott v. *McKinnish et ux. Slander — Actionable Words — Mitigation of Damages.* In an action of slander, exculpatory declarations made by the defendant, subsequently to the speaking of the actionable words, are not admissible in evidence.

In an action of slander, common report of the truth of the fact which the slanderous words assert, is not admissible in mitigation of damages.

In an action of slander, it is not necessary to prove the identical words charged, but proof of words substantially the same is sufficient.

As a general rule, the reputation of a female plaintiff for chastity, may be assailed in an action of slander for words charging a want of it to reduce the damages, but it is not permissible to direct such proof exclusively to the reputation in that respect, subsequent to the speaking of the slanderous words.

Under the plea of not guilty in an action of slander, the defendant may prove, in mitigation of damages, any thing short of a justification which does not necessarily imply, or tend to prove the truth of the words charged, but he cannot be permitted to prove facts and circumstances which conduce to establish the truth, or which form a link in the evidence to make out a justification.

A repetition of the words charged in a declaration in slander to have been spoken by the defendant, or other actionable words uttered by him in reference to the plaintiff after the institution of the suit, are admissible in evidence as tending to show the *quo animo* the words charged were spoken, but where such evidence is admitted, the jury should be instructed that it is admitted for that purpose alone, and that they are not to give damages for other than the words charged in the declaration.

It is not necessary, in an action of slander, that the plaintiff should prove the speaking by the defendant of all the words charged, to entitle him to recover. Proof of a part of them, if actionable of themselves, is all that is required.

Haden v. *Wail. Indian Title — Equity Jurisdiction — Mistake.* A purchaser from an Indian reserve acquires no title by his purchase, until the contract is approved by the president; when this is done, the purchaser is entitled to a patent, and when it issues it vests the fee in the purchaser.

When a patent issues to one, reserving the title of all others, whether legal or equitable, derived from W. & Co., a court of equity will subject the legal title to a superior equitable title derived from W. & Co.

When one with full knowledge of all the facts constituting his title to land, purchases it of another, or compromises a controversy in reference to it, and acts on the presumption that he has no title, the mistake, if one is made, is of law and not of fact.

To authorize a court of equity to interfere and grant relief for a mistake of law, the mistake must be so gross and palpable, as to superinduce the belief, that some undue advantage was taken of the party, from imbecility of mind or the exercise of improper influence.

Bussey v. *Branch Bank at Montgomery. Bill of Exchange. Parties.* In a suit by the bank of the state of Alabama, or any of its branches, on a joint and several promissory note or bill of exchange, judgment may be rendered under the statute of 1840, requiring all the parties to be sued on the same action against any defendant, whom the jury shall by their verdict find liable on it, although other defendants may make a successful defence and defeat a recovery against them.

Pollard v. *Menile. Estate of Married Women.* To create a separate estate in a married woman, a clear and manifest intention must appear on the face of the instrument, to exclude the marital rights of the husband.

The intervention of a trustee in cases where by the terms of the instrument the *marital rights* of the husband are not excluded, and he is allowed the use and enjoyment of the property, will not convert his estate therein into a mere equity.

A provision in a marriage contract, which does not create a separate estate in the wife in restraint of the husband's right, to alienate the personal property therein embraced, is void.

A marriage contract by which the personal property of the intended wife is conveyed to trustees, to have and to hold "*for the separate and exclusive use, benefit, and maintenance of her and her husband during their joint lives*," in no wise liable or subject to him, the said husband, or to the payment of any of his debts or liabilities now or hereafter existing,

does not create a separate estate in the wife, but vests such an estate in the husband, as when reduced to possession is liable to execution in law.

McGehee v. *Walker. Garnishment — Equity of Redemption.* A plaintiff in garnishment as against the garnishee, is substituted merely to the rights of his debtor, and cannot subject a demand on which the debtor himself in suing would not himself be entitled to recover.

If McG., having purchased at execution sale the equity of redemption of F. in a tract of land, which F. had previously mortgaged to G. as security for a debt, agrees with F. to divide with him the rents of the land so long as he retains the control of it, in consideration that F. will defend a bill of foreclosure, filed by the administrator of F., and furnish proof that will reduce the debt of G. to one-half the amount claimed, and in pursuance thereof F. files his answer to the bill, but fails to furnish any proof whatever, and a decree is rendered for the full amount, it is such a failure of consideration, on the part of F. as discharges McG. from his contract.

Reynolds v. *Reynolds. Award.* An award must conform to the submission under which it is made.

If arbitrators transcend their authority, the award *pro tanto* will be void, but it will be good as to the residue unless that which is void so affects the merits of the submission, that it cannot, without injustice, be separated from the balance.

Every reasonable presumption will be made in favor of an award, and if by the application of this principle it can be brought within the submission, and is in other respects unobjectionable, it will be sustained.

An award is not objectionable for want of mutuality which directs the payment of a sum of money by one party to the other, without prescribing any act to be done by the other.

Where under the submission of a cause pending in court to recover the amount of a bill single for $1,000 due the 1st March, 1846, wherein J. R. is plaintiff and W. R. is defendant, and in which the defendant has pleaded failure of consideration and fraud, the "arbitrators award," That the said W. R., defendant, shall have and hold the right, title, and interest, in and to the negro boy Nelson, and that in consideration of the same the note for $1,000, payable the 1st March, 1846, drawn in favor of J. R. and signed by W. R., be paid, and that W. R. the defendant pay the costs of the suit. *Held*,

1st. That the fair inference from the pleadings and the language of the award is, that the slave was the consideration of the bill single, and that the arbitrators merely decided that neither of the defences set up by the defendant was valid.

2d. That the award is not void for uncertainty, either in not naming the person to whom the money is to be paid, or in not specifying the amount of costs.

That in determining that the defendant should pay the bill single, the arbitrators must be understood as meaning that he should pay it according to its legal effect with interest.

Graham v. *Tankersley. Sale of Land — Notice — Equity Pleading.* Where a non-resident vendor of land is unable to make title, an averment,

in a bill filed by the vendee, that the vendor "is in very slender circumstances" and unable to respond in damages on her covenant of warranty, is sufficient to authorize the vendee to come into equity, to enjoin the collection of the purchase money.

A vendor of land, unless notified of the pendency of a suit against the vendee for its recovery and required to defend it, is not concluded by a judgment of eviction therein.

Notice to an agent appointed by the vendor of land to receive and collect a note, executed for the purchase money of the pendency of a suit by a third person against the vendee for the recovery of the land, is not notice to the vendor.

A plaintiff in a cross bill is not allowed to contradict his answer to the original bill. If he has made a mistake as to the facts in his answer, the only mode of correcting it is by application to the court for leave to amend it, or to file a supplemental answer, and not by the exhibition of a cross bill. Decree affirmed.

Benford, guardian, &c. v. *Gibson. Compensation of Public Officers.* 1st. The act of February, 1848, "prescribing and regulating the fees of the judges and clerks of the county courts of this state," operates as well on the judges in office at the time of its passage, as on those subsequently appointed.

2d. Appointments to public offices created by a state legislature are not considered contracts, in the sense of that term, as used in the 10th section of the 1st article of the constitution of the United States.

3d. The legislature of a state may increase or diminish the compensation allowed its public officers without any other restraint than that imposed by its own constitution.

4th. The act of February 18th, 1848, "prescribing and regulating the fees of the judges and clerks of the county courts of this state," does not violate any provision of the constitution of this state, or of the United States.

Hurst et al. v. *Weathers. Death of Defendant.* If an execution on a judgment against a sole defendant issues after his death, it is a nullity, and a sale under it of land, which the defendant in his life time had fraudulently conveyed to a third person, vests no title in the purchaser.

McKem et al. v. *Harwood. Action — Consideration.* H. desiring to rent a store for the year, obtained from B. and S., the respective owners of two, the refusal of them at the price fixed upon each, viz.: B.'s at $1,500, and S.'s at $1,200, McK. & Brother desiring also to rent one of the same stores, apply to B. and S. respectively for that purpose, each of whom informs them of his promise to H., and declines renting to them. McK. & Brother then call upon H., who consents to waive in their favor the privilege accorded to him by S., on the condition that they will pay him $150, it being one-half the difference between the prices of the two stores, to which they agree. H. thereupon rents and occupies for the year the store of B., and McK. & Brother rent and occupy for the same term the store of S. *Held*,

That the contract of McK. & Brother is founded on a sufficient consideration to support an action thereon instituted against them by H.

Nabors v. *Shippy*. *Verbal Promise — Money Counts.* A *verbal promise* made to an agent, to pay the amount of an execution in favor of the principal, which has been levied on the property of the defendant, in consideration that the agent will release the security, does not authorize an action against the promisor, in the name of the agent.

When an agent declares *in the common counts* on a promise made to him for the benefit of his principal, the plea of non assumpsit puts in issue the right of the agent to maintain the action in his own name.

Abstracts of Recent English Decisions.

Vice Chancellor Knight Bruce's Court.

McIntosh v. *Great Western Railway Company*, December 14, 1848. A contractor contracted to do certain works for a railway company, and the price was to be paid when the engineer of the company, certified the due performance of the work. Upon the completion of the work, the engineer refused his certificate, at the alleged instigation of the company. The contractor filed a bill in equity, charging collusion between the company and engineer; praying discovery, relief, and payment against the company; and seeking discovery from their engineer and secretary. All the defendants demurred, but the demurrers were overruled. The solicitors for the engineer cited *Steward* v. *East India Co.* (2 Vern. 380); *Wych* v. *Neale*, (3 P. W. 309); *Moodaloy* v. *Merton*, (1 Bro. C. C. 468); *Fenton* v. *Hughes*, (7 Ves. 287.) The vice chancellor stated that the first case, *Steward* v. *East India Co.* had not been exactly understood in the more recent cases. This case cannot be found in its regular place in the registrar's book, but a note of the argument and judgment is found in the court-book of the day, dated Wednesday, July 10, 1708. From this it appears that after hearing a number of counsel, the court said "*Allow the demurrer.*" Lord Eldon had an impression that in this case the demurrer was overruled, but the court-book says "Allow the demurrer; and as to the plea, let it stand for an answer, with liberty to accept and save the benefit of the plea until the hearing." 13 Jur. 92.

Nunn v. *Truscott*, Jan. 23, 1849. *Lease — Specific Performance.* By an agreement, dated in 1843, a tenant from year to year had the option to take a lease for twenty-one years, from Lady Day, in that year. In September, 1847, he, having allowed the premises to get out of repair, was served with a notice to quit. He then demanded a lease, and filed a bill for specific performance, which was dismissed with costs. 13 Jur. 114.

Bankrupt Cases.

Ex parte Hookins, In re Gundry, Jan. 24, 1849. — A bankrupt who had received a great part of his father's estate, by his will, gave his sister (in

1812) a bond for £3,000, with five per cent. interest, in order to repair the injustice which he considered his father to have done her. His sister at the same time signed a memorandum, by which she agreed not to claim the principal so long as the interest was promptly paid. His sister dying in 1841, bequeathed the bond (upon which interest had been regularly paid,) to her three children, who released her brother, he giving each of them a bond for £1000, payable five years after his death, with interest in the meantime. One of these three bonds was paid off by the bankrupt before his bankruptcy, which occurred in 1847. The court held these two valid, as there appeared to have been no *mala fides* on the part of any of the parties. See *ex parte Berry*, (19 Ves. 218,) which Sir Knight Bruce said he did not mean to contravene by the present decision.

Daniell v. *Daniell*, Feb. 16, 1849. *Will — Construction — Evidence.* A testatrix bequeathed to each of the three children of A. B. a legacy of £500. A. B. had, at the date of the will, three children. A. B. afterwards had another child, and then the testatrix by a second will, revoking the first, made a bequest in exactly the same words. Five other children were born afterwards, and the testatrix subsequently made a third will, revoking the second, and a fourth will, revoking the third, in each of which she made a bequest in exactly the same words: *Held*, that the word "three" must be read "nine," and that the nine children were entitled to £500 each. 13 Jur. 164. [This case was argued upon exceptions to the report of a master, which set forth that the three children born before the first will were the sole legatees. Sir Knight Bruce stated that he came to a different conclusion from the master, reluctantly, "because, probably, if the testatrix herself could interfere, she would reverse my (Sir K. B.'s,) decision, and maintain his" (the master's.) — Ed. Law Rep.]

Clive v. *Beaumont*, July 1, 1848. *Equity Pleading.* A bill filed by a vendor for specific performance of an agreement for the purchase of a leasehold house, stating various facts on which the plaintiff relied, as showing a waiver by the purchaser of the right to the lessor's title, but not in words stating or changing such waiver, was dismissed, although the court was of opinion that the defendant had, in fact, waived his right. 13 Jur. 326.

Vice Chancellor Wigram's Court.

Smith v. *Palmer*, January 12, 1849. *Construction of Will.* A testator left real and personal estate to trustees, upon trust to pay the income to his wife for life, and after her decease to realize and apply the proceeds upon trusts as follows, namely; — "And the monies thence arising they shall and do pay, distribute and divide, and I do hereby give and bequeath the same in manner following, that is to say, one-third part or share thereof unto my cousin J. S., if he shall be then living, but if he shall be then dead, unto his legal representative or representatives, if more than one share and share alike." The other two-thirds were given to two other

cousins on the same terms. J. S. survived the testator, but died before the widow. *Held*, that the one-third of the proceeds of the estate given to J. S. passed to his next of kin under the statute of distributions, and to those of his next of kin who were living at his (J. S.'s) decease. In this case, the court referred to a remark of Mr. Jarman, (2 Jarman, Wills, 105) and to a rule of construction contended for in this case, which was that a gift to a class, where the gift was substitutionary, was a contingent gift to such of the class as were living at the period of distribution — (in this case, to such representatives of J. C. as were living at the widow's death) Mr. Jarman says that such a construction is hardly reconcilable with analogous cases, and is peculiar to clauses of substitution in favor of children. In the case of *Eyre* v. *Marsden*, the plaintiff had only recently discovered his title to the premises, and had commenced an action of ejectment against the defendant, and praying an injunction to restrain the defendant from committing acts of trespass, alleged to be productive of irreparable waste. A demurrer to the bill was allowed with costs. (See *Jones* v. *Jones*, 3 Mer. 161.) A party out of possession, claiming real estate by title simply adverse to that of the party in possession, cannot be heard in a court of equity upon an application to restrain the party in possession from committing acts of trespass productive of irreparable waste, until he has. *Crowder* v. *Stone*, (3 Russ. 217); *Bennett* v. *Merriman*, (6 Beav. 360); *Booth* v. *Vickars*, (1 Coll. 6); *M'Gregor* v. *M'Gregor*, (2 Coll. 198); had been cited, but these were all cases of children substituted for parents, to which special case, the rule contended for is applicable. 13 Jur. 95.

Davenport v. *Davenport*, March 6, 1849. *Demurrer — Injunction — Trespass — Waste.* A bill in equity was filed by a party out of possession of real estate against the party in possession, and claiming by title adverse to that of the plaintiff, stating that the defendant had been in possession for twenty years, and that established his title at law. 13 Jur. 228. [This case is criticized in 13 Jur. 113. No. 638.]

Earl Granville v. *McNiele*, March 13, 1849. *Power — Trustees — Executors.* A power to appoint trustees reserved by deed to executors, of whom one renounced, was held to be properly exercised by the acting executors. 13 Jur. 253. [See 1 Sugden on Powers (7th ed.) pp. 139 - 142, and 2 ib. 510, which was cited approvingly by Sir James Wigram.]

Court of Queen's Bench — Hilary Term.

Holmes v. *London and South Western Railway Company.* January 31, 1849. An affidavit, upon which a rule for setting aside judgment was obtained, stated, that the judgment was signed, "*this day:*" *Held*, overruling *Foster* v. *Tattershall*, 13 Jur. 13. (2 Monthly Law Rep. N. S. 41,) that the *jurat* might be looked to supply the date. 13 Jur. 81.

Sittings in Banco after Michaelmas Term.

Doe d. *Pennington et al.* v. *Tanitre.* December 18, 1848. *Corporation — Seal — Presumption.* A lease, voidable by a corporation, may be

set up merely by their acceptance of rent, without evidence of any deed executed under their seal in that behalf. Payment and receipt of rent is evidence against a corporation of a demise by them, from year to year. The presumption, arising from such payment and acceptance is not inconsistent with the rule, that in general, a corporation can only contract by deed; it is merely a presumption raised against the corporation from their acts, that they have contracted in such manner as to be binding on them whether by deed or otherwise. *Et per curiam*, to enforce an executory contract against a corporation, it may be necessary to show, that it was by deed; but, where the corporation have acted as upon an executed contract, it is to be presumed against them that every thing has been done that was necessary to make it a binding contract upon both parties, they having had all the advantage they would have had if the contract had been regularly made. 13 Jur. 119.

Eason v. *Henderson*, Dec. 18, 1848. *Action — Tenant in Common.* In an action of account by a tenant in common against the executor of a co-tenant, the declaration stated the defendant's testator had the care and management of the whole, to receive and take the rents, &c., to the use and profit of the plaintiff and himself, (testator,) and that as bailiff of the plaintiff, he was to account to him for what he should receive more than his just share. The testator was in sole occupation, and received the whole profits, but no part was accounted for; he received no rents or profits other than the produce of the lands, to the expense of which the plaintiff in no way contributed. *Held*, that the defendant's testator was properly charged under Stat. 4 Ann. c. 16, § 27. 13 Jur. 150.

Legge v. *Harlock*, December 18, 1848. *Contract.* A declaration in debt set out a deed, by which it was provided, that certain specified work was to be done by the plaintiff for £418, but the defendant was to be at liberty to order additional work, or to diminish that specified, and payments or deductions were to be made accordingly. It was stipulated, that, if the specified work was not finished on the 23d of October, the plaintiff should pay £1 for every day used beyond the 23d as liquidated damages; provided, that in case the defendant should require additional works, the plaintiff should be allowed such extra time beyond October 23d as might be necessary for doing and completing the same. There was an averment that the defendant required additional works, the value whereof was £84, and that he made diminutions to the value of £2, and that the plaintiff would have finished the specified works on October 23d, but for the additional works ordered; that he completed the whole within thirty-one days after October 23d, and that such extra time was necessary to complete the additional works. The defendant pleaded that as to £22, parcel of the debt, and as to the extra time, that nine days only beyond October 23d were required by the additional works, but that thirty-one days were used, whereby the plaintiff became liable to pay £22 for the twenty-one days not required. This amount was pleaded in set-off. *Held*, on special demurrer, that the plaintiff was liable to pay £1 per day for every day used beyond October 23d, and not required by the additional works; and that, as the declaration claimed the value of the additional

works as a debt and liquidated sum, the defendant was entitled to set off the £22 against it. 13. Jur. 229.

Privy Council.

[Before Lords Langdale and Campbell, Baron Parke, and the Chancellor of the Duchy of Cornwall — Appeal from court of appeals of Canada.]

M'Kay v. *Rutherford*, December 12, 1848. *Parol Evidence — Commercial Contracts — Statute of Frauds.* The French law, established by the ordinance of Moulins, in the year 1566, as subsequently altered by the ordinance of 1667, whereby parol evidence was excluded from the proof of all contracts or matters exceeding the sum of 100 livres, except in case of accident, or where there was a commencement in writing, is no longer the law in Canada; but the English law, as to the admission of parol evidence prevails in all *commercial* matters. A contract entered into with commissioners, appointed under an act of parliament, to provide stone for making a canal, is a *commercial* matter. Although a contract may not be capable of performance within a year, yet an agreement between a contractor and another person, to share in the profits of the undertaking, is not such an agreement as by § 4 of the statute of frauds is required to be in writing. 13 Jur. 21.

Prerogative Court.

Bailey v. *The Earl of Portarlington*, November 30, 1848. A codicil, written by the sole legatee therein named, inaccurately worded, and not produced till some time after the will, which had also been in possession of the legatee, was pronounced for in the absence of evidence directly impeaching its validity.

Court of Exchequer. Sittings in Banco after Michaelmas Term.

Daines v. *Hartley*, December 1. *Slander — Evidence — Opinion of Witness.* In an action of slander, a witness who proves the speaking of the words, cannot be asked upon his direct examination, in the first instance what he understood by them. The proper course for counsel who propose to get rid of the obvious meaning of words used by a defendant in that form of action, is to lay a foundation by evidence showing something to prevent them from conveying that meaning, and then asking the witness in what sense he understood them. *Semble per Curiam.* That, generally speaking, no question should be put to a witness in such a form as to lead to an illegal answer. 12 Jur. 1093.

Court of Common Pleas. Sittings in Banco after Michaelmas Term.

Cockburn et al. v. *Alexander*, December 8, 1848. *Ship — Charter-party — Freight — Damages — Parol evidence.* A ship was chartered to bring home a cargo of "wool, tallow, bark, or other legal merchandise, bark not to exceed fifty tons, tallow and hides not to exceed eighty tons" and to deliver the same, "on being paid freight as follows: — For wool, one penny half penny per pound pressed, and one penny half penny and an eighth of a penny per pound unpressed." For the other articles, separate rates were fixed, and the master was to sign bills of lading at any rate of freight without prejudice to the charter-party. The ship returned with a full cargo, consisting of only a small portion of wool, and the residue, tallow, bark, hides, and other legal merchandise: — *Held*, (1) that the charterer was at liberty to ship a full cargo of merchandise, other than the specified articles; but that the same freight was to be paid as if the cargo had consisted entirely of those articles, according to the terms of the charter-party, (2) that the ship-owners were at least entitled to the smallest amount of freight so payable, as damages for breach of contract, in not loading according to the charter-party, (3) that there was no ambiguity upon the face of the charter-party to admit parol evidence for the purpose of showing who was to pay for pressing any wool which might be shipped. 13 Jur. 13.

Notices of New Books.

REPORTS OF CASES ARGUED AND DETERMINED IN THE COURT OF APPEALS OF THE STATE OF NEW YORK. By GEORGE J. COMSTOCK, Counsellor at Law. Vol. I. Albany: Gould, Banks & Gould, 104 State Street. New York: Banks, Gould & Co., 144 Nassau Street. 1849.

The above is the title of the first volume of a new series of reports in New York, and its appearance justifies the hope that the favorable reputation of the New York reports, hitherto, will be well sustained.

We have not had time to examine the book in detail. We notice, however, several cases of some interest. In the first case reported (*Pierce* v. *Delamatier*) a somewhat novel question of judicial conduct is thus stated in the marginal note: "Under the new constitution of this state, it is the right and the duty of a judge of the court of appeals to take part in the determination of causes brought up for review from a subordinate court of which he is a member, and in the decision of which he took part in the court below." In *Charles* v. *The People* (p. 180) it is held that under

the Rev. Stat. it is a misdemeanor to publish in the state an account of a lottery to be drawn in another state, although such lottery be authorized by the laws of the the place where it is to be drawn. We wish that the proprietors of a certain lottery-office in Baltimore, who have lately been sending round their worthless advertisements to persons in this city, and charging them therefor with heavy postage, might be made to feel the force of this decision. In *Sparrow* v. *Kingman* (p. 259) Bronson, J., gives a true view of the jurisdiction of an appellate court. He says: "The defendant's counsel place great reliance upon a remark of Mr. Justice Cowen, to the effect, that although the point was too firmly established to be revised by the supreme court, it might still be a fit question for review in the court of errors. There was, I think, a good deal of irony in that remark. Surely, the learned judge did not intend to be understood, that what was settled law in one court, was not also good law in all the other courts of the state; that a justice of the supreme court, when sitting in a court of errors, was at liberty to decide the other way. The thing is preposterous. The remark in question was made concerning a court which not only corrected erroneous decisions, *but sometimes took the liberty of reforming the law itself, where it was supposed to need improvement.* I claim no such prerogative. I am of opinion that the judgment of the supreme court should be affirmed." In "*Adams* v. *People*" (p. 173) it was held, that a person was properly indicted in *New York*, who obtained money from a firm of commission merchants in that city, by exhibiting to them a fictitious receipt signed by a forwarder in Ohio, falsely acknowledging the delivery to him of a quantity of produce for the use of and subject to the order of the firm. The defendant was a native of Ohio, had always resided there, and had *never* been in the state of New York. The receipt was drawn and signed in Ohio, and the offence committed by the receipt being presented to the New York firm by an innocent third person. The correctness of this decision seems very doubtful.

State Trials of the United States during the Administrations of Washington and Adams. With References, Historical and Professional, and Preliminary Notes on the Politics of the Times. By Francis Wharton, Author of "A Treatise on American Criminal Law," etc. Philadelphia: Carey & Hart, 126 Chestnut Street. 1849.

This is a very valuable and interesting work. Besides its value to the profession, it will constitute an important addition to the political history of our confederacy. A preliminary chapter contains an interesting account of the administrations of our two first presidents. The trials reported are those of Gideon Henfield, I. E. Guinet, The Western Insurgents, Francis Villato, Robert Worrall, William Blount, William Cobbett, Matthew Lyon, William Duane, (Editor of the "Aurora,") Jonathan Robbins, The Northampton Insurgents, David Frothingham, Isaac Williams, Thomas Cooper, Daniel Thomas, Anthony Haswell, and James I. Callender.

REPORTS OF CASES ARGUED AND DETERMINED IN THE ENGLISH COURT OF CHANCERY, WITH NOTES AND REFERENCES TO BOTH ENGLISH AND AMERICAN DECISIONS. By JOHN A. DUNLAP, Counsellor at Law. Vol. XX. Containing Young & Collyer's Reports. Vol. I. New York: Published by Banks, Gould & Co., Law Booksellers, No. 144 Nassau Street; and by Gould, Banks & Gould, No. 104 State Street, Albany. 1849.

This is the first volume of a valuable reprint of an important series of English Chancery Reports. Mr. Dunlap's notes greatly enhance the value of the work.

Miscellaneous Intelligence.

DOWER — EQUITY OF REDEMPTION. The following opinion was prepared by an eminent lawyer in Maine. It reviews some cases in Massachusetts, and possesses an interest and importance by no means local. We submit it with pleasure to our readers.

Mrs. N. T. claims of Mr. J. C. to be endowed of an estate in his possession, situate in P., being the same described in a deed made to her former husband, E. deceased, by one H. on the 30th of October, 1834, and which was reconveyed in mortgage to said H. as security for the payment of seven hundred dollars, being part of the consideration for the purchase, the whole amount being eight hundred dollars. Payments were made in reduction of the amount secured by mortgage by the deceased before December 31, 1845, when there remained due thereon $ 307.20, which was then paid by Mr. C. he having before purchased of the administrator of the estate of said deceased, who was duly licensed for the purpose, the right in equity of redeeming the premises. Mr. C. took no assignment of the mortgage, but had the same discharged as provided by statute, upon the margin of the record thereof. Under these circumstances, the parties have agreed that I shall decide whether Mrs. T. is entitled to dower in the premises, or in any equity of redemption therein; and, if entitled thereto, how much Mr. C. shall pay to her in discharge of her claim.

The Revised Statute of this state, c. 95, § 15, provides, that "If upon any mortgage made by a husband the wife shall have released her right of dower, or if the husband shall be seized subject to a mortgage made by another person, or made by himself before their intermarriage, his wife shall nevertheless be entitled to dower in the mortgaged premises as against every person except the mortgagee, and those claiming under him: provided, that if the heir, or other person claiming under the husband, shall redeem the mortgage, the widow shall repay such part of the money paid by him as shall be equal to the proportion, which her interest in the mortgaged premises bears to the whole value thereof: or else she shall be

entitled to dower only according to the value of the estate after deducting the money so paid for the redemption thereof. Mr. Crockett claimed under the husband by purchase of his representative, duly authorized to make sale of the right in equity of redeeming. So far the case is within the provision of the statute; but the condition of these parties is nevertheless, not within the express language of it. Mrs. Tuttle had not released her right of dower; and the deceased was not in possession of the estate incumbered by a mortgage made by him, or another person, before the intermarriage. The conveyance to the husband, and his instant reconveyance in mortgage, which formed a bar to the claim of dower against the mortgagee, and those claiming under him, is not one of the enumerated cases provided for. It cannot be doubted, however, that such a case is equally within the principle adopted by the statute, as those enumerated, and that the omission specifically to include it was entirely an oversight. And there is much reason to regard the enactment as a recognition of a principle, if not before expressly settled, yet as intended to govern in all similar cases. In *Cass* v. *Martin*, (6 N. H. Rep.) this principle was adopted. That case was precisely like the one under consideration. The tenant had purchased an equity of redemption of an administrator of a mortgagor, and had procured the mortgage to be discharged, as was done in this case. The widow of the mortgagor was allowed to be endowed only of the equity, on paying her proportion of the amount paid for the redemption. This decision is reasonable. One who purchases an equity of redemption can never compel a mortgagee to assign his mortgage, and yet must extinguish it. If the mortgagor bargains and sells his estate without reference to his mortgage, the vendee takes no other estate than if he had purchased the equity of redemption, merely, *eo nomine*. The purchaser in either case will be equally under the necessity of redeeming in order to perfect his title. The heir to the equity of redemption is in the same predicament. And it has often been ruled that a widow, entitled to dower in an equity of redemption, may redeem by paying the whole debt, and then hold the whole estate, till the others interested shall pay their proportions. This is the general rule in reference to such as are interested in an equity of redemption.

The decisions in Massachusetts on this subject are not easily reconcilable with each other. In the case of *Popkin* v. *Bumstead*, (7 Mass. R. 491,) the wife had joined her husband in a mortgage, relinquishing her right of dower. Afterwards, her husband having deceased, the administrator on his estate, being duly licensed for the purpose, sold his right in equity of redemption. The purchaser redeemed by paying the amount due, and having a discharge entered on the margin of the record, as was done in this case; yet the court held the widow was not entitled to dower. This decision may have been correct, as the action was at law, and the widow had not tendered or offered to pay her proportion of the amount paid for redemption; but the decision does not appear to have been made upon any such ground; and at that time it would seem that the right of a widow to be endowed of an equity of redemption had not been recognized. In *Eaton* v *Simonds*, (14 Pick. 98,) the court held the widow, under circumstances precisely similar to those in *Popkin* v. *Bumstead*, entitled to

dower, without contributing to the amount paid for redemption, because, say the court, "this mortgage has been legally discharged; the debt has been paid, and can no longer be set up as a subsisting title, either at law or in equity." And this decision is grounded, apparently, upon decisions cited from the New York Reports. But in *Gleeson* v. *Dyke*, (22 Pick. 390,) the court held that a purchaser of an equity of redemption of real estate, at a sale thereof on execution, who had redeemed by paying the amount due on the mortgage, and having a discharge entered on the margin of the record was to be considered as the assignee of the mortgagee. And why so? The mortgage had been legally discharged, and could no longer be set up as a subsisting title, either at law or in equity," according to the case of *Eaton* v. *Simonds*. The reply was that the Revised Statutes, c. 73, §§ 34 and 35, so provided; and our statute, concerning the sales of equities of redemption on execution, though there is no express provision for the purpose, would doubtless, independent of the section of the statute first cited, receive a similar construction. For it would be grossly inequitable, that the widow of the mortgagor in such case should be let in to have her dower assigned, without contributing her proportion towards the amount paid for redemption, in a case in which she had signed the mortgage deed, relinquishing her right of dower, or would otherwise be conditionally barred of her right. It cannot but be regarded as singular, that, when the title would no longer be set up as subsisting, either at law or in equity, the legislature of Massachusetts should have provided otherwise. It would seem that they must have recognized it as a correct principle, when any one was compelled to redeem, in order to perfect his title, and had no right at the same time to demand an assignment of the mortgage, that he should, upon paying the amount requisite to a redemption, be considered as having a right in equity to a contribution from any one else, who could have a right to be benefited by a redemption. All the authorities seem to show that if the heir should redeem, whether he takes an assignment of the mortgage or not, the widow would be entitled to dower as of an equity. 4 Kent's Comm. 39, and cases there cited. This shows that an assignment of the mortgage is not necessary to the preservation of an equitable right to a contribution from a widow, claiming dower in an equity of redemption. Finally, it is believed that the section of our statute first cited may be regarded as recognizing the principle, that one, who has redeemed a mortgage, after having purchased the right in equity of so doing, whether he takes an assignment of the mortgage or not, is in all cases entitled to a contribution from the widow of the mortgagor, before she can be endowed of the equity of redemption.

Right without a Remedy. It is said there is no right without a remedy. In Illinois there is a singular instance where a man may have a *right* to a thing, and yet, *in effect*, be without the means of obtaining a remedy. The circuit court has jurisdiction in sums over $20. A person having a claim against a non-resident, may take out an attachment against property found in the state. It may be taken against personal property, before a justice of the peace; but against real estate it must be taken from the circuit court. A resident may have a claim against

a non-resident for $19 — the defendant may have thousands of acres of land, but no personal property — and the plaintiff is remediless: he cannot obtain redress before a justice, because no personal property can be found out of which to make his debt — nor in the circuit court, because the amount is insufficient to give that court jurisdiction. Here is a *right* to a thing — an abundance out of which to make it — but no possible means of obtaining it — a right without a remedy.

Fairfield, Illinois.

Insolvents in Massachusetts.

Name of Insolvent.	Residence.	Commencement of Proceedings.	Name of Commissioner.
Adams, James W. } Adams, Augustus }	Lowell,	May 22,	Asa F. Lawrence.
Akerman, Benjamin M.	Quincy,	" 4,	Francis Hilliard.
Bartlett, Jonathan W.	Washington,	June 8,	Thomas Robinson,
Barton, John	Newburyport,	May 18,	John G. King
Bassett, Oscar M.	Franklin,	" 16,	Francis Hilliard.
Bird, Samuel J.	Chelsea,	" 5,	J. M. Williams.
Blake, Luke	Marlborough,	" 8,	Asa F. Lawrence.
Brackett, Antony	Cambridge,	" 12,	Asa F. Lawrence.
Bryant, Jos. R.	Boston,	" 30,	J. M. Williams.
Carlton, Samuel H.	Lynn,	" 25,	John G. King.
Clark, Jason	South Hadley,	" 18,	Myron Lawrence.
Clarke, John V.	Quincy,	" 9,	Francis Hilliard.
Cusick, Owen	Roxbury,	" 4,	Francis Hilliard.
Chase, William, et al.	Lynn,	" 16,	John G. King.
Darrah, Robert K. et al.	Boston,	" 4,	J. M. Williams.
Edwards, Richard B. et al.	Boston,	" 2,	J. M. Williams.
Ellis, Thomas J.	Weymouth,	" 15,	Francis Hilliard.
Emerson, Jacob	Boston,	" 15,	J. M. Williams.
Everett, Leonard, et al.	Canton,	" 11,	Francis Hilliard.
Goodale, G. D. et al.	Franklin,	" 11,	Francis Hilliard.
Goodale, W. G. et al.	Franklin,	" 11,	Francis Hilliard.
Gunnison, Emeline	Newburyport,	" 18,	John G. King.
Gurney, Barnabas H.	Rochester,	" 16,	Welcome Young.
Harrison, George N.	Charlestown,	" 28,	Asa F. Lawrence.
Hastings, Deming J. et al.	Franklin,	" 16,	Francis Hilliard.
Hodgdon, Henry A.	Boston,	" 17,	J. M. Williams.
House, B. J. & J. W.	Great Barrington,	" 5,	Thomas Robinson.
Huse, Samuel T. et al.	Lynn,	" 16,	John G. King.
Jewett, Stephen	Georgetown,	" 11,	John G. King.
Loomis, Lyman A.	Windsor,	" 29,	Thomas Robinson.
Loud, John A. E.	Weymouth,	" 7,	Francis Hilliard.
Mugge, Asa	Nantucket,	" 1,	George Cobb.
Morse, Lyman, et al.	Cambridge,	" 4,	J. M. Williams.
Phippen, George	Boston,	" 23,	J. M. Williams.
Rowe, Sherburne	Cambridge,	" 15,	Asa F. Lawrence.
Shaw, N. B. et al.	Boston,	" 2,	J. M. Williams.
Stacey, John	Concord,	" 22,	Asa F. Lawrence.
Stock, Hosea T. et al.	Canada,	" 11,	Francis Hilliard.
Taylor, J. & A. S.	Plymouth,	" 10,	Welcome Young.
Turner, Greenleaf	Boston,	" 29,	J. M. Williams.
Vincent, John B.	Springfield,	" 31,	George B. Morris.
Wiley, Sally L.	South Reading,	" 24,	Asa F. Lawrence
Young, D. & J. S.	Boston,	" 10,	J. M. Williams.